

## Exhibit 4

Raymond S. Hartman, Ph.D. Confidential - Attorneys' Eyes Only  
AM Session Boston, MA

October 7, 2004

1

1 THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF MASSACHUSETTS  
MDL DOCKET NO. 01CV12257-PBS

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IN RE: PHARMACEUTICAL  
5 INDUSTRY AVERAGE WHOLESALE  
6 PRICE LITIGATION

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7 THIS DOCUMENT RELATES TO:  
8 ALL ACTIONS

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9 C O N F I D E N T I A L

10 VOLUME: I

11 DEPOSITION of RAYMOND S. HARTMAN, Ph.D., a  
witness called on behalf of the Defendants  
12 pursuant to the Federal Rules of Civil  
13 Procedure, before Judith McGovern  
14 Williams, Certified Shorthand Reporter,  
15 Registered Professional Reporter,  
16 Certified Realtime Reporter, and Notary  
17 Public in and for the Commonwealth of  
18 Massachusetts, at the offices of Ropes &  
19 Gray, One International Place, Boston,  
20 Massachusetts 02110, on Thursday,  
21 October 7, 2004, commencing at 10:16 a.m.

22

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AM Session Boston, MA

October 7, 2004

2 (Pages 2 to 5)

<p>2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 HAGENS BERMAN L.L.P.</p> <p>4 Thomas M. Sobol, Esquire</p> <p>5 One Main Street, 4th Floor</p> <p>6 Cambridge, Massachusetts 02142</p> <p>7 617-482-3700</p> <p>8 tom@hagens-berman.com</p> <p>9 on behalf of the Plaintiffs</p> <p>10</p> <p>11 HOGAN &amp; HARTSON L.L.P.</p> <p>12 Steven M. Edwards, Esquire</p> <p>13 Hoa T.T. Hoang, Esquire</p> <p>14 875 Third Avenue</p> <p>15 New York, New York 10022</p> <p>16 212-918-3506</p> <p>17 smedwards@hhlaw.com</p> <p>18 htthoang@hhlaw.com</p> <p>19 on behalf of the Defendant</p> <p>20 Bristol-Myers Squibb</p> <p>21</p> <p>22</p>	<p>4</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 ROPES &amp; GRAY L.L.P.</p> <p>4 Steven A. Kaufman, Esquire</p> <p>5 One International Place</p> <p>6 Boston, Massachusetts 02110-2624</p> <p>7 617-951-7000</p> <p>8 skaufman@ropesgray.com</p> <p>9 on behalf of the Defendant Schering</p> <p>10 Corporation/Schering-Plough</p> <p>11</p> <p>12 SKADDEN, ARPS, SLATE, MEAGHER &amp;</p> <p>13 FLOM L.L.P.</p> <p>14 Katherine Armstrong, Esquire</p> <p>15 Four Times Square</p> <p>16 New York, New York 10036-6522</p> <p>17 212-735-3000</p> <p>18 karmstro@skadden.com</p> <p>19 on behalf of the Defendant Amgen</p> <p>20</p> <p>21 SHOOK, HARDY &amp; BACON L.L.P.</p> <p>22 Joseph G. Matye, Esquire</p> <p>23 2555 Grand Boulevard</p> <p>24 Kansas City, Missouri 64106-2613</p> <p>25 816-474-6550</p> <p>26 on behalf of the Defendant Aventis</p> <p>27</p>
<p>3</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 KAYE SCHOLER L.L.P.</p> <p>4 Saul P. Morgenstern, Esquire</p> <p>5 425 Park Avenue</p> <p>6 New York, New York 10022-3598</p> <p>7 212-836-7210</p> <p>8 smorgenstern@kayescholer.com</p> <p>9 on behalf of the Defendant Novartis</p> <p>10 Pharmaceuticals Corp.</p> <p>11</p> <p>12 DAVIS, POLK &amp; WARDWELL</p> <p>13 D. Scott Wise, Esquire</p> <p>14 450 Lexington Avenue</p> <p>15 New York, New York 10017</p> <p>16 212-450-4000</p> <p>17 dwise@dpw.com</p> <p>18 on behalf of the Defendant Astra</p> <p>19 Zeneca Pharmaceuticals Corp.</p> <p>20</p> <p>21</p> <p>22</p>	<p>5</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 PATTERSON, BELKNAP, WEBB &amp; TYLOR L.L.P.</p> <p>4 William F. Cavanaugh, Jr., Esquire</p> <p>5 1133 Avenue of the Americas</p> <p>6 New York, New York 10036-6710</p> <p>7 212-336-2000</p> <p>8 wfcavanaugh@pbwt.com</p> <p>9 on behalf of the Defendant</p> <p>10 Johnson &amp; Johnson</p> <p>11</p> <p>12</p> <p>13 COVINGTON &amp; BURLING</p> <p>14 Mark Lynch, Esquire</p> <p>15 1201 Pennsylvania Avenue, N.W.</p> <p>16 Washington, D. C. 20015</p> <p>17 202-662-5544</p> <p>18 mlynch@cov.com</p> <p>19 on behalf of GlaxoSmithKline</p> <p>20</p> <p>21</p> <p>22</p>

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<p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 MORGAN, LEWIS &amp; BOCKIUS L.L.P.</p> <p>4 Scott A. Stempel, Esquire</p> <p>5 1111 Pennsylvania Avenue, N.W.</p> <p>6 Washington, D. C. 20004</p> <p>7 202-739-5211</p> <p>8 sstempel@morganlewis.com</p> <p>9 on behalf of the Defendants Pfizer Inc.</p> <p>10 and Pharmacia Corp.</p> <p>11</p> <p>12 ALSO PRESENT:</p> <p>13 Janice H. Halpern, Leaf Group</p> <p>14 Eric M. Gaier, Ph.D., Bates White</p> <p>15</p> <p>16 Reporter's note: Additional parties</p> <p>17 participated via telephone conference call</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 EXHIBITS</p> <p>2 Number Page</p> <p>3</p> <p>4 Exhibit Hartman 004 Transcript of deposition of 109</p> <p>5 Raymond S. Hartman, taken</p> <p>6 May 25, 2004</p> <p>7</p> <p>8 Exhibit Hartman 005 Declaration of Stephen W. 138</p> <p>9 Schondelmeyer in Support of</p> <p>10 Plaintiffs' Motion for Class</p> <p>11 Certification</p> <p>12</p> <p>13 Exhibit Hartman 006 Medicaid and Medicare Drug 147</p> <p>14 Pricing: Strategy to Determine</p> <p>15 Market Prices, Final Report</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
<p>1 INDEX</p> <p>2 Witness Page</p> <p>3 RAYMOND S. HARTMAN, Ph.D.</p> <p>4 Direct Examination by Mr. Edwards 9</p> <p>5</p> <p>6 EXHIBITS</p> <p>7 Number Page</p> <p>8</p> <p>9 Exhibit Hartman 001 Two-page letter dated 12</p> <p>10 February 3, 2003, to Mr. Sobol</p> <p>11 from Mr. Hartman and one-page</p> <p>12 attached Attachment A</p> <p>13</p> <p>14 Exhibit Hartman 002 Declaration of Raymond S. 40</p> <p>15 Hartman in Support of</p> <p>16 Plaintiffs' Motion for Class</p> <p>17 Certification</p> <p>18</p> <p>19 Exhibit Hartman 003 Two-page Errata to Declaration 41</p> <p>20 of Raymond S. Hartman in</p> <p>21 Support of Plaintiffs' Motion</p> <p>22 for Class Certification</p>	<p>1 PROCEEDINGS</p> <p>2 ---</p> <p>3 RAYMOND S. HARTMAN, first having</p> <p>4 been duly sworn, testified as follows in</p> <p>5 answer to direct examination by</p> <p>6 MR. EDWARDS:</p> <p>7 ---</p> <p>8 Q. State your name, please.</p> <p>9 A. Raymond S. Hartman.</p> <p>10 Q. What is your address?</p> <p>11 A. My business address is Greylock McKinnon</p> <p>12 Associates, One Memorial Drive, Cambridge,</p> <p>13 Mass. 02142.</p> <p>14 Q. What is your home address?</p> <p>15 A. 52 Greylock Road, Newton, Massachusetts</p> <p>16 02465.</p> <p>17 Q. And by whom are you employed?</p> <p>18 A. I am self-employed, but I work with</p> <p>19 Greylock McKinnon Associates and with a</p> <p>20 variety of other firms.</p> <p>21 Q. Who owns Greylock McKinnon &amp; Associates?</p> <p>22 A. I do.</p>

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<p>10</p> <p>1 Q. Anybody else?</p> <p>2 A. No.</p> <p>3 Q. What have you been retained to do in this</p> <p>4 case?</p> <p>5 A. I was retained by counsel to the</p> <p>6 plaintiffs of the class in this case to</p> <p>7 review the Complaint and the allegations</p> <p>8 and to render an opinion if those</p> <p>9 allegations were to be true whether there</p> <p>10 would have been causation and impact,</p> <p>11 classwide impact, injury, and damages, and</p> <p>12 whether the extent of those damages could</p> <p>13 be measured by standard formulaic</p> <p>14 methodologies used by economists.</p> <p>15 Q. Is that the extent of your retention in</p> <p>16 connection with this case?</p> <p>17 A. I would say broadly speaking that to date</p> <p>18 has been what I have been asked to do. I</p> <p>19 may be asked to do other things.</p> <p>20 Q. Do you have any idea what you may be asked</p> <p>21 to do?</p> <p>22 A. No.</p>	<p>12</p> <p>1 Exhibit Hartman 001 for</p> <p>2 identification.)</p> <p>3 BY MR. EDWARDS:</p> <p>4 Q. I am going to hand you Hartman Deposition</p> <p>5 Exhibit 1 and ask you if you can identify</p> <p>6 that.</p> <p>7 (Pause.)</p> <p>8 (The witness viewing Exhibit</p> <p>9 No. 001.)</p> <p>10 A. This is a copy of the retention letter</p> <p>11 that was signed retaining us in this</p> <p>12 matter -- retaining Greylock McKinnon</p> <p>13 Associates and myself and any affiliates</p> <p>14 of Greylock McKinnon that have been useful</p> <p>15 to work on the matter.</p> <p>16 Q. What is your hourly rate?</p> <p>17 A. My hourly rate is \$400 an hour.</p> <p>18 Q. That is what is stated in the engagement</p> <p>19 letter?</p> <p>20 A. That's correct.</p> <p>21 Q. Is that in fact the hourly rate that you</p> <p>22 have charged?</p>
<p>11</p> <p>1 Q. And is there an engagement letter in</p> <p>2 connection with your retention?</p> <p>3 A. There is.</p> <p>4 Q. And you have brought it with you to the</p> <p>5 deposition?</p> <p>6 A. I have.</p> <p>7 MR. EDWARDS: Why don't we mark</p> <p>8 this as Hartman Deposition Exhibit 1. For</p> <p>9 the record, it is a letter from Raymond</p> <p>10 Hartman to Thomas Sobol dated February 3,</p> <p>11 2003, with one attachment, and</p> <p>12 unfortunately, we only have one copy at</p> <p>13 this point, but we can make copies during</p> <p>14 the break.</p> <p>15 MR. SOBOL: Could we just go off</p> <p>16 the record one moment?</p> <p>17 MR. EDWARDS: Yes.</p> <p>18 (Discussion off the record.)</p> <p>19 (Two-page letter dated</p> <p>20 February 3, 2003, to Mr. Sobol</p> <p>21 from Mr. Hartman and one-page</p> <p>22 attached Attachment A marked</p>	<p>13</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. Have you submitted bills to the</p> <p>3 plaintiffs in this case?</p> <p>4 A. We have.</p> <p>5 Q. And have all of those bills been paid at</p> <p>6 this point?</p> <p>7 A. No, they have not.</p> <p>8 Q. Okay. How much have you been paid at this</p> <p>9 point?</p> <p>10 A. To this point we have been paid \$150,000.</p> <p>11 Q. And how much have you billed?</p> <p>12 A. I would have to -- I would be guessing,</p> <p>13 because of the last month's invoices I did</p> <p>14 not have a chance to review. My guess is</p> <p>15 about 400 to 500 thousand dollars.</p> <p>16 Q. For how long has that additional \$250,000</p> <p>17 over the 150 that you have been paid been</p> <p>18 outstanding?</p> <p>19 A. I mean it could be 250 to 350.</p> <p>20 The -- I'm trying to recall. We</p> <p>21 have been consulting on the matter at a</p> <p>22 low level over a period of time, and the</p>

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<p>14</p> <p>1 150,000 had paid for work that had been 2 done since the retention, and probably at 3 the beginning of this year, and the -- 4 probably the remainder of the billing is 5 for work that is or invoices -- the unpaid 6 invoices are for the work that has been 7 done in the last two to three months. 8 Q. Okay. Have you been submitting invoices 9 monthly? 10 A. Yes. 11 Q. And do you recall when you submitted your 12 first invoice? 13 A. I would assume it would have been any time 14 -- I don't remember exactly when. It 15 would probably have been sometime after 16 this retention letter date. So this was 17 February 3, 2003, and as I say, early on, 18 we consulted on this matter before it led 19 to any kind of written materials or any 20 declaration. 21 Q. Are you saying that you consulted on this 22 matter before you signed the engagement</p>	<p>16</p> <p>1 take it, Tom, you are declining to produce 2 bills? 3 MR. SOBOL: Well, I don't think 4 the deposition is the time for us to iron 5 out questions about what is being produced 6 or not. I will be happy to discuss that 7 off line with you. 8 BY MR. EDWARDS: 9 Q. Do your bills include a breakdown of the 10 projects you have worked on on this case? 11 A. When -- I'm not sure I understand your 12 definition of the term "projects." 13 Q. Well, do they include a breakdown of the 14 activities you have engaged in? 15 A. Our bills are based on we track our time 16 daily by the quarter hour, and those are 17 submitted to our accounting department, 18 and those are aggregated to the level of 19 the staff member or the expert or the 20 affiliate such that the invoice that goes 21 to counsel summarizes the hours by 22 individual and then a description of all</p>
<p>15</p> <p>1 letter? 2 A. No. I am saying since -- before I 3 endeavored to undertake the work that 4 appears in my declaration, there was a 5 period of time since February of 2003 6 where we might consult on economic issues, 7 theories, issues that counsel wanted to 8 discuss, and at a low level, and then that 9 was going on since the time of the 10 retention. 11 Q. Have all of your bills for 2003 been paid? 12 A. I couldn't say. I would have to check. I 13 think they may have been. 14 Q. Have all of your bills for the first part 15 of 2004 been paid? 16 A. There is really no way for me to tell 17 unless I just get the invoices. I mean 18 the normal payments come in a chunk, 19 covering a number of -- of outstanding 20 invoices. 21 MR. EDWARDS: Now we requested 22 production of bills in our subpoena. I</p>	<p>17</p> <p>1 of the work that is summarized from the 2 individual daily billing sheets. We keep 3 the daily billing sheets should counsel 4 ever request them, but we don't submit 5 that with the invoices. 6 Q. Do you separate out your expenses? 7 A. We do. 8 Q. And do you bill them at your own cost, or 9 is there a markup? 10 A. We bill them at cost. 11 Q. Have you disclosed to Mr. Sobol what your 12 profit margins are? 13 A. He hasn't asked. 14 Q. Do you think he would be able to negotiate 15 a better price from you if he knew that? 16 A. Perhaps. 17 Q. Do you think you are obligated to disclose 18 your profit margins to Mr. Sobol? 19 A. In terms of negotiating a price and what 20 my billing rate is, it is as with all of 21 the people that do the kind of work that I 22 do or that we do. There is an</p>

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<p style="text-align: right;">18</p> <p>1 understanding of what our rates are 2 relative to what the profit margins are, 3 and the prices in my billing rate is a 4 signal as to what those are. 5 If I were to go to Lexecon and 6 see rates, I might be billing my rate at 7 \$800 an hour at Lexecon. It would be a 8 different signal, but there would be 9 signals about what profit margins would be 10 that people understand, because in this 11 business, people have an understanding and 12 expectations of those billing rates and to 13 what the profit margins are. 14 Q. Have you consulted with plaintiffs' 15 counsel on their theory of the case? 16 MR. SOBOL: Objection to form. 17 A. I'm not quite sure. I mean they have 18 obviously, as I have stated in my 19 declaration, there is a set of allegations 20 that they will -- they plan to prove at 21 trial, and I have taken those, I have 22 accepted those as given, and based on</p>	<p style="text-align: right;">20</p> <p>1 -- an interested party that I may want to 2 interview in a 30(b)6 context, like a 3 third-party payer or a manufacturer? 4 Q. Well -- 5 A. I'm not quite sure what you mean by 6 "interview." 7 Q. Well, I am not talking about the formal 8 discovery process. I am talking about 9 gathering information outside of the 10 formal discovery process. 11 Have you attempted to gather 12 information outside of the formal 13 discovery process by interviewing anybody? 14 A. Well, you are saying "outside of the 15 formal discovery process." I have been 16 working on pharmaceutical litigation of 17 this sort for say the last 10 years, and 18 in the process, outside of this formal 19 proceeding, I have interviewed people, I 20 have spoken to people at the -- colleagues 21 at the Harvard School of Public Health, 22 issues have been discussed, structures of</p>
<p style="text-align: right;">19</p> <p>1 those, I have consulted as to the theory 2 of what the impacts would be given the -- 3 that those -- that those allegations are 4 proved at trial. So I have consulted on 5 that aspect of it. 6 Q. Did you give them any advice on what they 7 should allege? 8 A. No. 9 Q. Did you review any drafts of any 10 Complaints? 11 A. Well, when I was writing my declaration, I 12 asked for the final amended master 13 consolidated Complaint so I knew what the 14 definition of the class was and what the 15 allegations were, but that was it. 16 Q. I take it you didn't review any draft 17 complaints before they were filed? 18 A. Not that I recall. 19 Q. Have you interviewed anybody in connection 20 with this case? 21 A. When you say "interviewed," do you mean 22 anybody, period? Do you mean anybody that</p>	<p style="text-align: right;">21</p> <p>1 markets have been discussed, how pricing 2 works has been discussed. I have talked 3 to distributors at times. I have -- I 4 have talked to insurers. So I have 5 interviewed people in this industry over 6 the last five to ten years that are 7 outside of this formal proceeding, but I'm 8 not -- is that -- 9 Q. Well, have you interviewed anybody in 10 connection with your work on this case? 11 A. The -- since much of the work on this case 12 reflects what has gone on in this industry 13 over the last 10 years, or last 15, 20, 30 14 years, certainly the conversations and the 15 interviews that I have undertaken, that I 16 have participated in the past, have 17 relevance to this case, but they were done 18 before I had started this case, so they 19 weren't specifically for this case, but 20 they certainly shed light on the 21 allegations and the implications of those 22 allegations.</p>

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<p style="text-align: right;">22</p> <p>1 Q. So the answer to my question, I take it, 2 is you have not interviewed anybody 3 specifically in connection with your work 4 on this case? Is that fair to say? 5 A. Well, what -- if you would define -- we're 6 back at what -- it depends on what is 7 "is," for -- 8 Q. I don't know about Bill Clinton. 9 (Laughter.) 10 A. What do you mean by "interview"? 11 Certainly with this case, I have talked to 12 people over at the Harvard School of 13 Public Health. 14 Q. In connection with this case? 15 A. In connection with this case. If that's 16 an interview -- I took that as 17 discussions. You know, if that is what 18 you are defining as an interview -- 19 Q. Who have you talked to at the Harvard 20 School of Public Health in connection with 21 this case? 22 A. I have talked to Professor Joseph</p>	<p style="text-align: right;">24</p> <p>1 A. No. 2 Q. Are you relying on anything any of them 3 told you in connection with the opinions 4 expressed in your declaration? 5 A. Well, in forming the opinions expressed in 6 my declaration, I clearly wanted to 7 evaluate and elucidate the structure, the 8 conduct, the performance of the entities 9 in this market, and so I would ask some -- 10 I would ask them to find out -- to look at 11 the statutory history of Medicare, 12 Medicaid, and their reliance on AWP, and I 13 would ask them to do projects. And so 14 they, being closer to that, those kinds of 15 issues, and having worked in those 16 markets, they know where to go to the 17 information more readily than some of my 18 other staff. So I did talk with them. I 19 had them do projects for me and bring back 20 materials that I could review. 21 Q. Who is "they" there? 22 A. They are all the people that I have</p>
<p style="text-align: right;">23</p> <p>1 Newhouse. I have talked with Professor 2 Richard Frank. I have talked with 3 Professor Meredith Rosenthal. There are a 4 variety of postdocs working at Harvard. 5 One -- and I can give you their names, if 6 you want, if you want their names, but in 7 terms of gathering some data or doing some 8 work on this, I have had them do things, 9 and I have said, "What have you found in 10 regard to this? What have you found in 11 regard to that?" So if that fits under 12 the rubric of interview, I have 13 interviewed those people. 14 Q. Okay. Why don't you identify the postdocs 15 then. 16 A. One is Ben Summers. One is Doug Levy. 17 I'm trying to think if there were any 18 others. There were probably others whose 19 names escape me now, but I can ascertain 20 those for you if that's important. 21 Q. Have you taken any notes of those 22 interviews?</p>	<p style="text-align: right;">25</p> <p>1 mentioned today. 2 Q. Did they give you anything in writing? 3 A. They essentially, if I said I want you to 4 summarize a document, they would -- I 5 would say, "Send me a copy of the 6 document, and, you know, tell me what's in 7 it." 8 Q. I'm not sure you have answered my 9 question. Did they give you anything in 10 writing? 11 A. They would say -- 12 MR. SOBOL: Objection. Asked 13 and answered. Go ahead. 14 A. They would send -- they would send a 15 paragraph or two summarizing what the 16 document showed. 17 Q. Okay. And do those documents still exist? 18 A. Those documents appear as I reviewed them 19 and as I asked them to do them they appear 20 in my declaration. They are -- they -- 21 when I wanted a particular part of the 22 declaration outline filled in, I would</p>



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<p style="text-align: right;">26</p> <p>1 take that, I would read the sources that 2 they provided, and it appears in my 3 declaration. 4 MR. EDWARDS: I request 5 production of those materials. 6 A. You know, I -- 7 MR. SOBOL: That's to Sobol, not 8 Hartman. 9 THE WITNESS: I see. Oh, that's 10 why you are here. 11 MR. SOBOL: Every once in a 12 while. 13 BY MR. EDWARDS: 14 Q. Other than the materials you just 15 mentioned, is everything you relied on in 16 reaching the opinions set forth in your 17 declaration identified in the declaration 18 itself? 19 A. My standard operating procedures are. At 20 the beginning of a case of this sort, I 21 sit down with my staff and I say, "Look, I 22 need to -- I need to see stuff on this</p>	<p style="text-align: right;">28</p> <p>1 opinions in my declaration. 2 Q. So, in other words, what you are telling 3 me is everything you relied on is 4 identified in the declaration itself? 5 There may have been additional materials 6 that you considered, but you didn't rely 7 on them? 8 A. That's right. 9 Q. Okay. You mentioned your kids. I take it 10 you are not talking about your children? 11 A. I'm -- I think of them as my children. 12 (Laughter.) 13 Q. You are talking about your staff? 14 A. I am talking about my staff, who, when you 15 get to be my age, they all look like kids, 16 so. 17 Q. Who on your staff is working with you on 18 this? 19 A. Staff members include Renee Rushnawitz. 20 Q. Can you -- 21 MR. SOBOL: Can you spell these 22 names as you go through, please?</p>
<p style="text-align: right;">27</p> <p>1 area, this area, this area, this area, 2 this area." They will usually come back 3 with banker's boxes filled with documents 4 or related materials. I will generally 5 then -- and they know the subset from the 6 corpus of the entire set of documents to 7 show to me. So there was -- there were 8 hundreds of banker's boxes of documents at 9 counsel, counsel's offices. My kids went, 10 and they maybe brought back five or six. 11 I then went through those and said, "You 12 know, this -- I don't need this," or "this 13 is redundant. I don't need to look at 14 that." 15 The set that I -- so I have 16 reviewed more than what is listed in 17 attachment B, but what I ultimately ended 18 up relying on, I didn't -- I didn't list 19 redundant things that I didn't need to 20 rely on or that I did rely on. What is 21 listed in attachment B is what I 22 ultimately relied on to express the</p>	<p style="text-align: right;">29</p> <p>1 THE WITNESS: R-E-N-E-E 2 R-U-S-H-N-A-W-I-T-Z; Michael Augustine -- 3 MR. SOBOL: A-U-G-U-S-T-E-I-N? 4 THE WITNESS: No. There is a J 5 in there. 6 MR. SOBOL: No, there is not. 7 A. I think if you just spelled it 8 A-U-G-U-S-T-I-N-E it will be close enough. 9 It is a Dutch name with a J and some 10 strange consonants, which I can never 11 spell. 12 Andrew Bechtel, Andrew is as you 13 would guess, and B-E-C-H-T-E-L, as you 14 would no doubt guess, too. 15 Oden, O-D-E-N, Bizan, B-I-Z-A-N. 16 That's all I can think of right now. 17 Q. Is everybody on your staff working on this 18 matter? 19 A. No. 20 Q. Do you have additional staff members who 21 are working on other matters? 22 A. Yes.</p>

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<p style="text-align: right;">30</p> <p>1 Q. How many staff members do you have 2 altogether? 3 A. I have about, of the kids with B.A.s, six 4 or seven; one Master's degree, a person 5 with a Master's degree; and three Ph.D.'s 6 on the staff. 7 Q. How many other matters are you working on 8 at this point? 9 A. Me personally or the firm? 10 Q. I will take both. 11 A. I would guess me, maybe five or ten. If 12 they settled, you know, I don't keep track 13 of them. 14 The firm, with our varieties of 15 affiliates, perhaps 40 or 50. 16 Q. What percentage of the revenue of your 17 firm do you anticipate this matter will 18 account for? 19 A. Of the firm, certainly less than 20 10 percent. 21 Q. How about you? 22 A. Five percent.</p>	<p style="text-align: right;">32</p> <p>1 data, helping get data, developing 2 settlement materials. 3 Q. Have you agreed to any cap on your fees? 4 A. Not to date. 5 Q. Do you anticipate that you will do so in 6 the future? 7 A. No. 8 Q. Do you plan to rely on anything in 9 connection with your work in this case 10 that is not identified in your 11 declaration? 12 A. Well, I certainly lay out at the end of my 13 declaration a variety of information that 14 I do want to see. I suspect that there 15 is, of what I have relied on now in terms 16 of data, there is what I have looked at to 17 date is a minuscule part of the data that 18 will be required to implement the 19 formulaic methodologies that I have put 20 forward, and I assume there is going to be 21 additional materials that I will read, 22 characterizing the market, characterizing</p>
<p style="text-align: right;">31</p> <p>1 Q. How about for you personally? 2 A. For me personally? 3 Q. Yes. 4 A. You know, I would say it -- it is hard to 5 tell. I am -- there is a number of -- you 6 know, I would say 10 percent maybe. 7 Q. Have you given Mr. Sobol a budget in 8 connection with this case? 9 A. No. 10 Q. Or a work plan? 11 A. We have certainly given a work plan -- 12 well, we have discussed what needs to be 13 done, but there is no written outline of 14 the work, and there is -- 15 Q. Have you given him an estimate of the 16 amount you anticipate charging? 17 A. I -- I -- if he had asked me for it, I 18 would say it is impossible to know, 19 because we get calls about settlement -- 20 there is just so much that is -- that we 21 get asked to do that we have not 22 anticipated, and that involves looking at</p>	<p style="text-align: right;">33</p> <p>1 behavior in the market. I have -- since 2 this has been submitted, I see articles in 3 various industry magazines or journals 4 that I have noticed but that haven't been 5 reflected in what I have written. So, 6 yes, there will certainly be, I think, 7 much more that I will rely on. 8 Q. Well, is there anything that you have seen 9 since you submitted your declaration that 10 you know at this point you are going to be 11 relying on but it is not identified in 12 your declaration? 13 A. That I know I will rely on? No. That I 14 might rely on? Perhaps. But I just don't 15 know. 16 Q. Is any of the work that you have done in 17 the past of assistance to you in arriving 18 at your conclusions? 19 A. Certainly. 20 Q. Which work? 21 A. All of it. 22 Q. Okay. Is any of your past work of more</p>

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10 (Pages 34 to 37)

<p style="text-align: right;">34</p> <p>1 assistance than others?</p> <p>2 A. Well, certainly the issues that arise here</p> <p>3 arise in a variety of cases that purport</p> <p>4 to lead to damages where prices are --</p> <p>5 where there are overcharges, and so the</p> <p>6 methodologies put forward here are</p> <p>7 standard to work -- antitrust work that I</p> <p>8 have done for a variety of industries in a</p> <p>9 variety of markets over time. So in that</p> <p>10 case, the notion of the formulaic</p> <p>11 methodologies, measurement of damage,</p> <p>12 calculations of but-for, quantities, of</p> <p>13 values, has been informed by 30 years of</p> <p>14 doing this kind of work.</p> <p>15 The specific work I have been</p> <p>16 doing in the pharmaceutical industry</p> <p>17 obviously has relevance to understanding</p> <p>18 the structure and the behavior and the</p> <p>19 incentives and how pricing works in this</p> <p>20 market, and that's, if one looks at my CV,</p> <p>21 it is all the work that has been done with</p> <p>22 the pharmaceutical market, starting with</p>	<p style="text-align: right;">36</p> <p>1 that matter redound on the wholesalers as</p> <p>2 a group.</p> <p>3 Q. Do you recall whether you were working for</p> <p>4 plaintiffs or defendants in that case?</p> <p>5 A. Defendants.</p> <p>6 Q. Have you ever submitted an affidavit in</p> <p>7 connection with class certification on</p> <p>8 behalf of a defendant?</p> <p>9 A. I have.</p> <p>10 Q. Can you identify those matters?</p> <p>11 A. Those matters have generally been</p> <p>12 employment discrimination cases where a</p> <p>13 class has been certified, and I have been</p> <p>14 asked to assess the formulaic</p> <p>15 methodologies of how damages are</p> <p>16 calculated.</p> <p>17 Q. Have you ever submitted an affidavit on</p> <p>18 behalf of defendants in the pharmaceutical</p> <p>19 industry in connection with class</p> <p>20 certification? And by affidavit, I mean</p> <p>21 report, declaration, --</p> <p>22 A. Right.</p>
<p style="text-align: right;">35</p> <p>1 the brand name prescription drug case.</p> <p>2 Q. You worked on the brand name case?</p> <p>3 A. I did.</p> <p>4 Q. What is your understanding of what the</p> <p>5 issues were in that case?</p> <p>6 A. In that case, it is -- it has been so long</p> <p>7 that I wouldn't even want to try to</p> <p>8 characterize them. I worked specifically</p> <p>9 with a group of Harvard faculty for one of</p> <p>10 the wholesalers, and I was essentially</p> <p>11 looking at pricing issues and how pricing</p> <p>12 at wholesale worked.</p> <p>13 Q. Do you recall anything about the pricing</p> <p>14 issues that you were looking at?</p> <p>15 A. I certainly recall the, you know, the --</p> <p>16 the use of the prices, the benchmark</p> <p>17 prices that are employed in the industry,</p> <p>18 the use of AWP, the use of WAC, the use of</p> <p>19 chargebacks, the negotiation of prices for</p> <p>20 the pharmaceuticals, how the wholesalers</p> <p>21 fit into that structure, what their</p> <p>22 margins are, how -- how the allegations in</p>	<p style="text-align: right;">37</p> <p>1 Q. -- whatever.</p> <p>2 A. Right.</p> <p>3 I don't think so.</p> <p>4 Q. Have you ever submitted a report in which</p> <p>5 you concluded that a class should not be</p> <p>6 certified?</p> <p>7 A. No.</p> <p>8 Q. Or that injury could not be determined on</p> <p>9 a classwide basis?</p> <p>10 A. No. As a matter of fact, the work that I</p> <p>11 have done for defendants in those matters</p> <p>12 and that appears in some of my published</p> <p>13 work is that given the definition of</p> <p>14 class, there are sophisticated formulaic</p> <p>15 methodologies that allow one to calculate</p> <p>16 variations in the quanta of damages across</p> <p>17 different class members.</p> <p>18 Q. So you have never seen a proposed class</p> <p>19 you didn't like?</p> <p>20 A. I don't know if that's true.</p> <p>21 Q. Can you identify any for me?</p> <p>22 A. Ask me that tomorrow. I will think that</p>

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<p style="text-align: right;">38</p> <p>1 through. As I sit here now, you know, 2 obviously -- no. I have -- there probably 3 are classes that may not be -- should not 4 be certified, but I haven't -- I haven't 5 seen one. 6 Q. Are any of your prior projects 7 confidential? 8 A. As far as -- my understanding is that they 9 all are. 10 Q. Okay. So there are certain things you 11 will not be able to talk about in 12 connection with your prior projects 13 because you are subject to confidentiality 14 agreements? 15 A. That's correct. 16 Q. Do you rely on any economic principles or 17 theories in arriving at the conclusions in 18 your declaration? 19 A. I rely on basic microeconomic principles 20 and theories. 21 Q. Well, is there anything more specific that 22 you can identify other than the broad</p>	<p style="text-align: right;">40</p> <p>1 specific within that broad category? 2 MR. SOBOL: Objection to the 3 form. 4 A. The specificity is found in what -- what 5 -- what I have -- what appears in my 6 declaration are the specific aspects that 7 I have drawn from microeconomic theory 8 that allows me to look at structure, 9 conduct, performance, incentives, 10 behavior. 11 Q. Let's look at your declaration. 12 MR. EDWARDS: We'll mark as 13 Exhibit 2 the Declaration of Raymond S. 14 Hartman in Support of Plaintiffs' Motion 15 for Class Certification dated September 3, 16 2004. 17 (Declaration of Raymond S. 18 Hartman in Support of 19 Plaintiffs' Motion for Class 20 Certification marked 21 Exhibit Hartman 002 for 22 identification.)</p>
<p style="text-align: right;">39</p> <p>1 general area of basic microeconomic 2 principles and theories? 3 A. Well, microeconomic theories and 4 principles inform -- I mean there is -- 5 there is a field of economics that deals 6 with individuals and entities, and hence 7 the name microeconomics. It deals with 8 behavior in different situations, in 9 competitive, noncompetitive, 10 oligopolistic, various kinds of strategic 11 situations. The application of those 12 principles to industries is a field called 13 industrial organization, and any economist 14 coming to any matter, whether it is 15 pharmaceutical or allegations of some kind 16 of illegal behavior in another market, 17 needs to bring the full throw weight of 18 that experience because each different 19 industry may require other various 20 specific aspects of the full corpus of 21 that -- of that training. 22 Q. I take it you can't think of anything</p>	<p style="text-align: right;">41</p> <p>1 Mr. EDWARDS: And to be fair to 2 the witness, we will mark as Exhibit 3 the 3 errata to the witness' declaration, which 4 I was provided with at the outset of this 5 deposition. 6 (Two-page Errata to Declaration 7 of Raymond S. Hartman in 8 Support of Plaintiffs' Motion 9 for Class Certification marked 10 Exhibit Hartman 003 for 11 identification.) 12 BY MR. EDWARDS: 13 Q. Why don't you identify Exhibits 2 and 3 14 for me. 15 MR. EDWARDS: There are copies 16 if you want to pass them down. 17 (Handing copies of Exhibit 18 No. 003 to all counsel.) 19 (Pause.) 20 (The witness viewing Exhibit 21 No. 002.) 22 BY MR. EDWARDS:</p>

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12 (Pages 42 to 45)

<p style="text-align: right;">42</p> <p>1 Q. I will represent to you that it is a true 2 and correct copy of what plaintiffs' 3 counsel served on us. 4 A. And I -- I honor your representation, and 5 I'm -- I'm sure I am going to come to the 6 same conclusion as I familiarize myself 7 with the fullness of my opinion. 8 Q. Does that count against my time or Tom's 9 time? 10 (Laughter.) 11 A. God, this is a good declaration. I had 12 forgotten how good it was. 13 MR. SOBOL: It is long enough. 14 THE WITNESS: Yes. It is 15 measured in -- 16 (Further pause.) 17 (The witness continues to view 18 Exhibit No. 002.) 19 A. I concur with your representation. 20 Q. And Exhibit 3? 21 A. I concur with that representation, too. 22 Q. When did you create the errata sheet?</p>	<p style="text-align: right;">44</p> <p>1 Q. September 3rd. 2 A. September 3rd? 3 Q. It is dated September 3rd. 4 A. I would say, you know, July and August 5 were the heavy lifting on that. I mean 6 obviously we could -- well, I could 7 ascertain that more fully for you, but I, 8 you know, I would say over July and August 9 were the periods. 10 Q. How much time did you spend working on 11 your declaration? 12 A. My guess would be, oh, God, anywhere from 13 100 to 200 hours. 14 Q. How many drafts did you go through? 15 A. I -- the outline -- 16 THE WITNESS: Are we waiting for 17 somebody? 18 MR. MORGENSTERN: No. Somebody 19 got bored. 20 THE WITNESS: How insulting. 21 (Laughter.) 22 A. I really -- the outline of the declaration</p>
<p style="text-align: right;">43</p> <p>1 A. Yesterday. 2 Q. Okay. What is it that prompted you to 3 create the errata sheet? 4 A. I read my report. 5 Q. So these particular items that are 6 reflected in the errata sheet did not come 7 to your attention until you read the 8 report yesterday? 9 A. Well, I -- I have been -- I reviewed it 10 Monday and yesterday, and I started -- I 11 noticed a number of errata, and I started 12 tabulating them. At the end of the day 13 yesterday, this is the sum total of errata 14 that I found. 15 Q. Did counsel bring any errata to your 16 attention? 17 A. No. 18 Q. When did you first start to draft your 19 declaration? 20 A. I would say sometime -- in -- it was in 21 the summer. You know, whether it was -- 22 when was it filed?</p>	<p style="text-align: right;">45</p> <p>1 was in my mind before I sat down, and I -- 2 so it was one evolving draft. I mean I 3 would be adding stuff. As I said, I asked 4 one of our kids over at Harvard to get me 5 some information, and then I would weave 6 it in. So he would send me a paragraph or 7 two. I would weave it in and edit it into 8 the text of it. 9 So I don't know how to best -- 10 you know, there was -- clearly it was 11 evolutionary. This would not get written 12 from beginning to end and then come back 13 and revise and revise and revise. It just 14 essentially continued to expand as I 15 continued to assimilate the materials that 16 I received from the various staff members 17 and the data analyses that I asked them to 18 do and that I was able to interpret. 19 Q. Did anyone write any portion of your 20 declaration for you? 21 A. Well, as I said, the -- I asked some of 22 the kids to tell -- to find out how, say,</p>

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<p style="text-align: right;">46</p> <p>1 federal upper limit is defined and how MAC</p> <p>2 is defined, and give me four sentences,</p> <p>3 and then the -- and then the underlying</p> <p>4 regulations. I took those four sentences</p> <p>5 and wove them into it. But that is the</p> <p>6 only type of writing that was done. I</p> <p>7 wrote every -- that wasn't based on a</p> <p>8 specific idiosyncrasy of either Medicare</p> <p>9 or Medicaid or how AWP was used in a</p> <p>10 certain situation, where I would ask them</p> <p>11 to at least tell me what they read, and</p> <p>12 then I would ascertain whether they were</p> <p>13 right when I looked at the source</p> <p>14 material.</p> <p>15 Q. Take a look at paragraph 11F of your</p> <p>16 declaration, and that appears on page 10.</p> <p>17 (Witness complying.)</p> <p>18 Q. In that paragraph, you are describing your</p> <p>19 formulaic methodology, and you say, "This</p> <p>20 type of methodology has been widely used</p> <p>21 in scientific analysis of the penetration</p> <p>22 of generic drugs."</p>	<p style="text-align: right;">48</p> <p>1 reports that you have done?</p> <p>2 A. The methodology that I use is</p> <p>3 fundamentally a methodology that</p> <p>4 identifies what a but-for set of AWP's</p> <p>5 would be absent the AWP scheme. And so</p> <p>6 that methodology is common to all of</p> <p>7 antitrust. It is common to the types of</p> <p>8 analyses from which -- that would draw</p> <p>9 from what is cited in footnote 24. It is</p> <p>10 -- it is the same type of analysis -- it</p> <p>11 is analogous to the analysis that are put</p> <p>12 forward in footnote 25, formulaic</p> <p>13 methodologies, and it is analogous to the</p> <p>14 methodologies put forward in footnote 26</p> <p>15 and essentially what those methodologies</p> <p>16 are, in all of this kind of analyses are.</p> <p>17 You are saying, look, there is a violation</p> <p>18 of some sort, and it has interfered with</p> <p>19 the way a market should work, and I'm</p> <p>20 going to -- I'm going to develop a</p> <p>21 methodology to come up with what a set of</p> <p>22 prices or any economic verbals would be</p>
<p style="text-align: right;">47</p> <p>1 And then you have a footnote and</p> <p>2 a citation to a number of articles.</p> <p>3 Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. Are you saying that these articles discuss</p> <p>6 your methodology?</p> <p>7 A. I'm saying that these articles use methods</p> <p>8 that go to markets that predict how prices</p> <p>9 and market share change under certain</p> <p>10 competitive conditions, and they allow for</p> <p>11 examining what prices would look like but</p> <p>12 for certain -- certain situations. So</p> <p>13 that the methodology that I proposed here</p> <p>14 doesn't appear in here, but components of</p> <p>15 the notion of calculating but-for prices,</p> <p>16 but-for market results, where prices would</p> <p>17 be different absent a certain -- certain</p> <p>18 behavior, the bases, the methodological</p> <p>19 bases for those kinds of analyses,</p> <p>20 examples are found in that literature.</p> <p>21 Q. Does your methodology appear anywhere</p> <p>22 other than in your report and other</p>	<p style="text-align: right;">49</p> <p>1 absent those -- that -- that alleged</p> <p>2 conduct.</p> <p>3 And that's what I have done here</p> <p>4 and adapted it to the facts of this case,</p> <p>5 so it's exactly in the tradition of</p> <p>6 standard methodologies used in these</p> <p>7 matters.</p> <p>8 Q. Are you saying that these articles that</p> <p>9 are cited in footnote 24 of your report</p> <p>10 discuss your methodology for determining</p> <p>11 but-for spreads?</p> <p>12 A. No.</p> <p>13 Q. Fine. And to the extent that --</p> <p>14 A. But let me clarify that.</p> <p>15 Q. -- your methodology differs from the</p> <p>16 principles discussed by the authorities</p> <p>17 cited in footnote 24, would you defer to</p> <p>18 those authorities?</p> <p>19 MR. SOBOL: Objection to the</p> <p>20 form.</p> <p>21 Do you need to clarify your</p> <p>22 prior answer?</p>



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<p style="text-align: right;">50</p> <p>1 THE WITNESS: I do need to 2 clarify my prior answer, but I can clarify 3 it in response to both of the questions. 4 A. In any of these matters, in case -- in 5 Hatch-Waxman cases where we're talking 6 about allegations of alleged foreclosure 7 of generic entry, there are -- one has to 8 come to those markets and use the corpus 9 of microeconomics and industrial 10 organization to model what that market 11 would look like absent but for the alleged 12 violations. 13 The kinds of modeling that are 14 done here can be used to calculate but-for 15 prices under conditions that are absent 16 alleged violations, and so what I have 17 cited here is methods that are the basis 18 for coming up with but-for prices, say in 19 Hatch-Waxman matters, but the note -- the 20 fundamental important issue here is in a 21 variety of different types of alleged 22 illegal behavior, you bring to bear</p>	<p style="text-align: right;">52</p> <p>1 take the model from a cartel behavior and 2 apply it to some other foreclosure of an 3 entrant, you're going to have a different 4 model, the equations will look different, 5 but the fundamental issue is calculating 6 how the world would look and how prices 7 would be but for that violation, and this 8 -- what I have done here is exactly in the 9 tradition in that way of the articles that 10 are cited in footnote 24, 25, and 26. 11 Q. Do any of these articles talk about a 12 methodology for calculating but-for AWP's? 13 A. The -- in these matters -- in these 14 matters, the AWP wasn't the price subject 15 to the scheme or the allegations. 16 Q. Do any of these articles talk about using 17 surveys as a method for determining market 18 expectations for the purpose of 19 calculating but-for AWP's? 20 A. One would go to -- you know, let -- two 21 things to clarify. 22 If you are going to keep asking</p>
<p style="text-align: right;">51</p> <p>1 economic principles and you calculate what 2 but-for -- what the -- what prices or 3 quantities would be absent violations. 4 The types of materials -- of -- 5 of formulations in footnote 24 are aimed 6 at generic launches, generic penetration. 7 So they're not aimed at the allegations 8 here. But they are -- they use basic 9 microeconomics and industrial 10 organization -- 11 Let me finish -- 12 -- to calculate but-for prices. 13 And the same is true in the 14 footnote -- what is cited in footnote 25, 15 and in going into footnote 26, where 16 they're talking about general methods of 17 using statistical or econometric methods, 18 the notion in all of these, each one of 19 the cases may be different, I mean there 20 may be a different allegations about 21 foreclosure, about conspiracy, about price 22 fixing, about cartel behavior, and if you</p>	<p style="text-align: right;">53</p> <p>1 me about but-for AWP's, none of these 2 articles, none of these cases here in the 3 Hatch-Waxman matters or what is discussed 4 generally with principles in footnote 26 5 are analyzing an AWP scheme, a fraud- 6 related AWP. So they're not going to 7 mention AWP. But that is irrelevant. 8 What these articles develop are 9 the fundamental methods for calculating 10 and using yardsticks to come up with 11 but-for calculations of other prices, and 12 so you're not going to find AWP mentioned 13 in here as a -- in terms of estimating as 14 a but for. But the same principles apply 15 there as they do in this case. 16 Q. Is it fair to say that you are the first 17 person you know of that has attempted to 18 calculate but-for AWP's? 19 A. I wouldn't know. 20 Q. You don't know of anybody else, I take it? 21 A. I know that there are a variety of reports 22 conducted by the Office of the Inspector</p>

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<p style="text-align: right;">54</p> <p>1 General for DHHS that talk about 2 relationships between AWP and transactions 3 prices, acquisition costs, and these are 4 the types of studies and the types of 5 surveys that try and deal with what is a 6 relationship between an AWP. 7 Now those -- that's the -- what 8 I have done here is no different than what 9 all of these researchers are doing and 10 trying to understand the benchmark of the 11 AWP relative to acquisition costs and real 12 transaction prices in the market. 13 Q. But as far as you are aware, no one else 14 has attempted to calculate but-for AWP? 15 Is that correct? 16 A. What I -- what I'm saying is -- 17 Q. Isn't it possible for you to answer my 18 question yes or no? 19 A. Well, not if -- not if -- not if the -- 20 not if it is -- the answer will be 21 misleading to the record. 22 The -- while the OIG calculates</p>	<p style="text-align: right;">56</p> <p>1 MR. EDWARDS: Let's take a 2 break. 3 (Recess taken at 11:03 a.m.) 4 (Recess ended at 11:11 a.m.) 5 BY MR. EDWARDS: 6 Q. Did anybody give you any comments on your 7 declaration other than counsel? 8 A. I certainly discussed portions of the 9 declaration with Richard Frank. I mean it 10 wasn't so much comments, as I would raise 11 the issues and my opinions, and we would 12 discuss them. So Professor Richard Frank; 13 Professor Meredith Rosenthal. 14 Q. Anybody else? 15 A. No. 16 Q. Did they look at your actual declaration 17 or a draft of your declaration, or are you 18 saying that you just discussed some of the 19 concepts with them? 20 A. We certainly discussed concepts. I can't 21 recall whether they saw a draft or not, 22 just because it was July and August, and</p>
<p style="text-align: right;">55</p> <p>1 relationships between AWP and other 2 transaction prices, they don't call it a 3 but-for price, because they're not doing 4 something in a litigation context, but 5 what they are doing is exactly what I am 6 doing. So they just don't call it AWP. 7 Q. So you are saying -- 8 A. I am saying but people are doing these 9 kinds of studies and relating this and 10 seeing what the yardstick means. They 11 just don't call it a but-for AWP. 12 Q. You are saying your methodology for 13 calculating AWP was created for purposes 14 of litigation? 15 A. What I am saying is that in -- in 16 innumerable legal cases, economists 17 develop but-for measures of regulated 18 rates in utility cases, but-for prices, 19 and the -- this is a standard way, this is 20 a standard methodology, in terms of coming 21 up with a measure of what the world would 22 look like absent the alleged behavior.</p>	<p style="text-align: right;">57</p> <p>1 their being academics, they are usually 2 gone and don't have the time to focus. 3 Q. Have you been retained by any of the 4 plaintiff firms in this case in connection 5 with any other matters? 6 A. Well, there is -- there are probably 7 innumerable plaintiffs' firms attached to 8 this matter, and so it would be hard for 9 me to say. The answer is probably yes, 10 but I probably would need to clarify 11 whether I could indicate which cases. 12 Q. What do you mean? When you say "clarify," 13 what do you mean? 14 A. Well, to name the cases, unless I have 15 been named as a witness, a testifying 16 expert. 17 Q. You mean it might be confidential? 18 A. It might be confidential. 19 Q. Well, for those situations that are not 20 confidential, can you name the cases? 21 A. I have submitted a declaration in support 22 of class certification for the Cipro</p>



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16 (Pages 58 to 61)

<p style="text-align: right;">58</p> <p>1 matter in California.</p> <p>2 THE WITNESS: Can I confer with</p> <p>3 counsel?</p> <p>4 (The witness and Mr. Sobol</p> <p>5 conferring off the record.)</p> <p>6 A. There are some which I just, I mean I have</p> <p>7 submitted declarations through damages,</p> <p>8 but I don't know whether they have been</p> <p>9 sealed. A lot of this stuff is filed</p> <p>10 under seal, so I will -- I will defer -- I</p> <p>11 can ask counsel.</p> <p>12 I have -- I have been retained</p> <p>13 and have submitted declarations in the</p> <p>14 Lupron matter, which I think you guys</p> <p>15 know, since you got my report, and the</p> <p>16 other ones, I just -- I have filed a</p> <p>17 variety of declarations that go from class</p> <p>18 cert. through damages and liability, but</p> <p>19 until I find out whether they are under</p> <p>20 seal or not, I can't answer.</p> <p>21 Q. Can you tell me how many matters there are</p> <p>22 that you have worked with plaintiffs'</p>	<p style="text-align: right;">60</p> <p>1 Q. More than 5 million?</p> <p>2 A. Now we are talking about my cases? These</p> <p>3 are my cases or the firm's?</p> <p>4 Q. These are revenues --</p> <p>5 A. Generally --</p> <p>6 Q. -- that have come to your firm in</p> <p>7 connection with cases that you or your</p> <p>8 firm have been retained by any of the</p> <p>9 plaintiff counsel in this case.</p> <p>10 A. Are we talking now in like over the last</p> <p>11 10 years or on an annual basis?</p> <p>12 Q. Sure. Let's take five years.</p> <p>13 A. Oh, God. Five million? Five million over</p> <p>14 five years? That may be. I don't know.</p> <p>15 If it is, it is -- it ain't much over five</p> <p>16 million.</p> <p>17 Q. Now you got your Ph.D. from MIT? Is that</p> <p>18 correct?</p> <p>19 A. That's correct.</p> <p>20 Q. Did you have a faculty advisor, something</p> <p>21 like that?</p> <p>22 A. I had a variety of faculty advisors.</p>
<p style="text-align: right;">59</p> <p>1 counsel on this case?</p> <p>2 A. Again speaking generally for all the, you</p> <p>3 know, sometimes there are different</p> <p>4 co-lead counsels with whom I am dealing,</p> <p>5 but I understand there is a group, many of</p> <p>6 them are a coalition, I would -- I would</p> <p>7 say five to ten.</p> <p>8 Q. And can you give me a rough estimate of</p> <p>9 the total revenues that have come to your</p> <p>10 firm as a result of those cases?</p> <p>11 A. I would have to -- I would have to, you</p> <p>12 know, get some calculation of that. I</p> <p>13 can't -- I couldn't say.</p> <p>14 Q. More than 100 million?</p> <p>15 A. 100 million?</p> <p>16 Q. Yes.</p> <p>17 A. Oh, Jesus Christ. Yes, we are doing 100</p> <p>18 million every year. No, no, no, no.</p> <p>19 (Laughter.)</p> <p>20 A. 100 million, we are not Lexecon.</p> <p>21 Q. More than 10 million?</p> <p>22 A. No.</p>	<p style="text-align: right;">61</p> <p>1 Q. Do you recall who they were?</p> <p>2 A. On my thesis committee sat Jerry Houseman,</p> <p>3 Morris Adelman, and I can't recall who the</p> <p>4 third. That was a while ago.</p> <p>5 Q. Did you have any interaction with Frank</p> <p>6 Fisher while you were in graduate school?</p> <p>7 A. Certainly.</p> <p>8 Q. What was your relationship with him?</p> <p>9 A. It was -- it was good. He recruited me to</p> <p>10 join CRA a number of times or attempted</p> <p>11 to.</p> <p>12 Q. But in what context did you interact with</p> <p>13 him when you were in graduate school?</p> <p>14 A. Well, he was --</p> <p>15 Q. Was he your advisor?</p> <p>16 A. He was not an advisor. He taught a</p> <p>17 course. He taught Principles in</p> <p>18 Econometrics and Statistics and</p> <p>19 Mathematics, some of which I took. I</p> <p>20 can't remember which ones. And then he</p> <p>21 was a colleague when I was a vice</p> <p>22 president of the Charles River Associates.</p>

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17 (Pages 62 to 65)

<p style="text-align: right;">62</p> <p>1 He had offered me jobs at Charles River 2 Associates a number of times. So he is a 3 colleague and a former faculty -- a former 4 professor of mine. 5 Q. What do you think of him as an economist? 6 A. He is a good economist. 7 Q. And what do you think of CRA? 8 A. I think there are a set of firms that do 9 the kind of work that we do, and I think 10 CRA is in the -- might be one of the 15 11 firms in the top five. 12 Q. Okay. Why did you -- 13 A. But, you know, this is not like the top 14 40. We don't sit down and rank these 15 things by beat and whether you can dance 16 to it or not. 17 Q. Did you do any work with their 18 pharmaceutical group while you were there? 19 A. No. 20 Q. Why did you leave? 21 A. I got a better offer. 22 Q. Where did you go?</p>	<p style="text-align: right;">64</p> <p>1 A. It is, as I say in my report, and I 2 thought in a very powerful way -- well, I 3 can't find it. 4 That it is essentially the glue 5 that binds the pricing system together. 6 Q. My question is how did you find out about 7 it. 8 A. Oh, I thought you said what did you find 9 out about it. 10 Q. No. How did you find out about it? 11 A. I found out about it just by merely 12 beginning to study the market. That is 13 one of the first things -- when one is 14 studying pricing and pricing behavior, it 15 is one of the first things that shows up 16 on the radar screen. 17 Q. When did you first hear about WAC? 18 A. The same time. 19 Q. How long did it take you to figure out 20 that there was a difference between AWP 21 and WAC? 22 A. Well, from given the information that I</p>
<p style="text-align: right;">63</p> <p>1 A. I went to Cambridge Economics, Inc. 2 Q. When did you first start doing work in 3 connection with the pharmaceutical 4 industry? 5 A. As I said, I first got serious with work 6 in the pharmaceutical industry when I 7 worked with Richard Frank and Professor 8 Tom Maguire for -- in the brand name drug 9 pharmaceutical litigation. 10 Q. And when was that? 11 A. I would have to look at my CV. Dates 12 begin to -- mid to late '90s. 13 (Pause.) 14 (The witness viewing Exhibit 15 No. 002.) 16 A. '96. 17 Wait a second. That is a 18 different one. So '95, '96. 19 Q. When did you first hear about AWP? 20 A. As soon as I started studying the 21 industry. 22 Q. How did you find out about it?</p>	<p style="text-align: right;">65</p> <p>1 was able to review and looking at 2 documentation that was subject to 3 confidentiality and a variety of things, 4 it was immediately clear it was less -- 5 WAC was less than AWP. 6 Q. What documentation are you talking about? 7 A. Just case materials in the brand name 8 pharmaceutical litigation. 9 Q. Are you talking about pleadings? 10 A. Well, no. You look at contracts. You 11 look at price lists. You read about how 12 prices are negotiated. 13 Q. Contracts of whom? 14 A. Contracts of wholesalers, of manufacturers 15 -- with manufacturers, with third-party 16 payers. 17 Q. How long did it take you to figure out 18 that manufacturers offered discounts below 19 WAC? 20 MR. SOBOL: Objection to the 21 form. 22 A. I, you know, I really can't -- I can't say</p>

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18 (Pages 66 to 69)

<p style="text-align: right;">66</p> <p>1 when one realized that. Obviously as soon 2 as you read a contract, you see that 3 pricing with various entities is AWP less 4 a certain percent plus a dispensing fee. 5 So you become aware of the fact that the 6 AWP is a benchmark for negotiations among 7 many entities in the market, and because I 8 could look at the proforma contracts that 9 led to the negotiations. 10 Q. How long did it take you to figure out 11 that AWP is a benchmark for negotiations? 12 MR. SOBOL: Objection to the 13 form. 14 A. You know, the way you are framing it -- it 15 is not a question of time. It is a 16 question of when did I first see these 17 contracts, when did I get the contracts. 18 And I might have been shown the contracts 19 two years after I started doing the work. 20 I don't know the time, but it is once one 21 starts seeing contracts and starts 22 evaluating the behavior and the</p>	<p style="text-align: right;">68</p> <p>1 research and analysis of the use of AWP is 2 that it is a -- it is a list price from 3 which -- that is used as a benchmark from 4 whence all transactions prices are 5 ultimately negotiated. 6 Q. Is it a price that relates to transactions 7 between wholesalers and pharmacies? 8 MR. SOBOL: Objection to the 9 form. 10 A. Well, AWP and WAC for any manufacturer 11 almost uniformly has a set relationship, a 12 formulaic relationship, determined by the 13 manufacturer, and so AWP and WAC are two 14 focal prices, two benchmarks, that are 15 used in discussions of pricing throughout 16 the market, whether it is with third-party 17 payers, whether it is with retailers, 18 whether it is with PBMs. So the -- it is 19 the glue that binds the system in the 20 sense that in the evidence I have reviewed 21 all discussions of pricing, however -- 22 whatever the acquisition costs turn out to</p>
<p style="text-align: right;">67</p> <p>1 negotiations that go on and the use of 2 chargebacks, one realizes that the role 3 WAC plays and the role that AWP plays. 4 Q. Wasn't the basic issue in brand names the 5 fact that there are discounts below WAC? 6 MR. SOBOL: Objection to the 7 form. 8 A. The -- that case is sufficiently receded 9 in my memory -- obviously there were 10 allegations of price discrimination, but 11 the part of the matter upon which I 12 focused didn't -- was -- was limited to 13 the financial performance of the 14 wholesalers, and so that I would hesitate 15 to say that, you know, to characterize it 16 the way you have characterized it. 17 Q. What is your definition of AWP? 18 MR. SOBOL: Objection to the 19 form. 20 A. Well, my definition is what -- I mean AWP 21 has -- is defined as the average wholesale 22 price, and my understanding and my</p>	<p style="text-align: right;">69</p> <p>1 be, whatever the reimbursement rates turn 2 out to be, they are based on AWP. 3 Q. Take a look at attachment D to your 4 report. What I want to do is direct your 5 attention to footnote one. 6 (Witness complying.) 7 Q. Do you have it? 8 A. I do. 9 MR. SOBOL: Did you say D or B? 10 MR. EDWARDS: D. 11 THE WITNESS: D. It follows C. 12 MR. SOBOL: All right. 13 Q. You cite an article by Dawn Gencarelli, 14 G-E-N-C-A-R-E-L-L-I, in which she 15 discusses AWP. Do you agree with what she 16 said there? 17 A. I do. 18 Q. Now did it surprise you when you learned 19 that pharmaceutical manufacturers offered 20 discounts below AWP? 21 MR. SOBOL: Objection to form. 22 A. I don't -- you know, I don't think there</p>

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19 (Pages 70 to 73)

<p style="text-align: right;">70</p> <p>1 is -- it -- "surprise" would not be the</p> <p>2 word.</p> <p>3 Q. Are you aware of any industry in which</p> <p>4 benchmarks or list price is used in which</p> <p>5 the sellers do not discount?</p> <p>6 A. The -- that would be an empirical issue.</p> <p>7 It is certainly clear that there are lots</p> <p>8 of industries where there is a list price,</p> <p>9 which is a starting point for -- is the</p> <p>10 benchmark from whence discounting and</p> <p>11 negotiations off of that benchmark are</p> <p>12 negotiated by various members, various</p> <p>13 entities at various stages of the vertical</p> <p>14 structure of that market.</p> <p>15 Q. Are you aware of any industries in which</p> <p>16 sellers disclose their discounts to the</p> <p>17 general public?</p> <p>18 A. I know that there are -- there are</p> <p>19 industries -- there are industries that</p> <p>20 purport to provide information leading to</p> <p>21 an understanding of what discounts might</p> <p>22 be, the automobile industry being one</p>	<p style="text-align: right;">72</p> <p>1 consumers and inform them as to those</p> <p>2 discounts.</p> <p>3 MR. EDWARDS: I am going to move</p> <p>4 to strike the answer insofar as it was not</p> <p>5 responsive to my question.</p> <p>6 Q. My question to you, sir, --</p> <p>7 MR. SOBOL: Motion denied.</p> <p>8 Q. -- is are you aware of any industries in</p> <p>9 which sellers disclose their discounts off</p> <p>10 of list price to the public.</p> <p>11 A. And my -- my -- my answer is -- must be</p> <p>12 then conditioned on the fact that I know</p> <p>13 there is information that characterizes</p> <p>14 those discounts. From whence it is</p> <p>15 gathered, I'm not always sure, but</p> <p>16 certainly in the auto industry, some of it</p> <p>17 is gathered from sellers.</p> <p>18 Q. Do you think that if you --</p> <p>19 MR. SOBOL: Are you finished</p> <p>20 with your answer?</p> <p>21 Q. -- were to --</p> <p>22 THE WITNESS: Yes.</p>
<p style="text-align: right;">71</p> <p>1 where they talk about rebates and upfront</p> <p>2 payments and a variety of things off of a</p> <p>3 sticker price.</p> <p>4 So that there are -- there are</p> <p>5 industries where some information is</p> <p>6 provided. There are -- there are groups</p> <p>7 within certain markets where they try and</p> <p>8 provide information and expectations and</p> <p>9 inform consumers, say through consumer</p> <p>10 reports, of the types of discounts that</p> <p>11 are possible. I know there has been --</p> <p>12 there has been studies that have been put</p> <p>13 out by the OIG here trying to indicate and</p> <p>14 measure and measuring the types of</p> <p>15 discounts that were being found between</p> <p>16 the AWP -- the discounts off of AWP toward</p> <p>17 an acquisition cost.</p> <p>18 So, yes, I'm aware of industries</p> <p>19 where discounts are offered. I am aware</p> <p>20 of industries where there is information</p> <p>21 and expectations about what discounts are.</p> <p>22 I am aware of groups that try and help</p>	<p style="text-align: right;">73</p> <p>1 MR. SOBOL: Okay.</p> <p>2 MR. EDWARDS: Excuse me. I</p> <p>3 didn't catch what Tom said.</p> <p>4 (Prior record read.)</p> <p>5 MR. EDWARDS: Sorry.</p> <p>6 BY MR. EDWARDS:</p> <p>7 Q. Do you think if you walked into a General</p> <p>8 Motors dealer and asked that dealer to</p> <p>9 tell you all the discounts that it had</p> <p>10 given off of MSRP in the last year that</p> <p>11 that dealer would tell you that?</p> <p>12 A. I would -- I would think that anyone</p> <p>13 coming in off the street, having listened</p> <p>14 to the Dodge Ram commercials or the Toyota</p> <p>15 commercials or whatever, would have some</p> <p>16 idea of what types of discounts were</p> <p>17 available.</p> <p>18 From reviewing sources, Kelly's</p> <p>19 Blue Book and maybe some NITSA</p> <p>20 documentation or Consumer Reports, there</p> <p>21 would be some idea of what the dealer</p> <p>22 acquisition cost is. It is not going to</p>

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20 (Pages 74 to 77)

<p style="text-align: right;">74</p> <p>1 be a perfect idea. But there is going to 2 be expectations that there is some dealer 3 acquisition costs and there is a sticker 4 price, and you are going to go in, and 5 they're going to say, you know, the 6 Toyota, the list price is 23,500. And 7 there is, based on the information that is 8 available, that there is a dealer 9 acquisition cost that may be 25 percent 10 less or whatever, but you are not going to 11 know exactly what it is. And you are 12 going to negotiate between what your idea 13 of what that dealer acquisition cost is 14 related to the sticker price, between -- 15 If I could finish? 16 -- between that dealer, your 17 understanding of the dealer acquisition 18 cost, and the sticker price. And so that 19 you have -- you have expectations and 20 information from the various sources about 21 what that is. 22 Now if -- well, period.</p>	<p style="text-align: right;">76</p> <p>1 A. Well, good for whom? You are talking 2 about -- you said are they good in 3 general? 4 MR. SOBOL: There is no question 5 before you. 6 THE WITNESS: Oh, sorry. 7 Q. I take it, Dr. Hartman, that you do not 8 consider yourself to be an expert in the 9 pharmaceutical industry? Is that correct? 10 A. Well, could you -- could you be more 11 specific? 12 Q. Well, do you consider yourself to be an 13 expert on Medicare Part B? 14 A. No. 15 Q. You haven't analyzed the statutory history 16 of Medicare Part B; correct? 17 A. Not in the depth that I could write a 18 learned journal paper on it or teach a 19 course in it. No. 20 Q. And you don't consider yourself to be an 21 expert in Medicare regulation, do you? 22 A. No.</p>
<p style="text-align: right;">75</p> <p>1 Q. Would you agree as an economist that 2 discounting is good? 3 MR. SOBOL: Objection to the 4 form. 5 A. Well, the -- I would agree as an 6 economist, you know, that consumer welfare 7 is enhanced when prices are reduced and 8 when -- when there is -- when there are 9 price reductions related to technological 10 progress, related to certain factors of 11 production costing less, and those are 12 passed on to consumers, that is -- that is 13 consumer -- that enhances consumer 14 welfare. If those price increases are 15 passed on to middle men and the prices to 16 the consumers do not reflect the 17 discounts, and indeed if the prices go up 18 to consumers, then it has not been -- then 19 discounts based on enhancing consumer 20 welfare are not good. They are bad. 21 Q. Well, we can discuss that and debate that 22 I think for a while, but I will move on.</p>	<p style="text-align: right;">77</p> <p>1 Q. Then you don't consider yourself to be an 2 expert on insurance reimbursement for 3 pharmaceuticals? Is that correct? 4 A. I have -- I certainly have come to 5 understand and study insurance 6 reimbursement. But do I have a chaired 7 professorship in the area? No. 8 Q. Well, I asked you whether you considered 9 yourself to be an expert on insurance 10 reimbursement. 11 A. Well, the -- and I'm -- I will give you a 12 qualified no. 13 Q. Nor are you an expert on the relationships 14 between payers, PBMs, pharmacies, and 15 manufacturers? Isn't that correct? 16 A. I have certainly submitted an expert 17 declaration that draws on an understanding 18 of relationships between insurers and PBMs 19 and manufacturers, and I am expert enough 20 in, as an economist, to come to an 21 industry to render the opinions that I 22 have in my declaration.</p>



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21 (Pages 78 to 81)

<p style="text-align: right;">78</p> <p>1 Q. But you are not an expert on those 2 relationships in and of themselves, are 3 you? 4 A. I am expert enough to render the 5 declaration I have rendered. 6 Q. Well, that remains to be seen, but. 7 A. Oh, now let's not get personal. 8 (Laughter.) 9 Q. You do not consider yourself to be an 10 expert on the terms and conditions and the 11 interactions between payers and PBMs with 12 respect to prescription drugs; isn't that 13 true? 14 MR. SOBOL: Objection to the 15 form. Asked and answered. 16 THE WITNESS: Yes. Asked and 17 answered. 18 Q. Well, as between you and Dr. Shandenmyer, 19 who do you think has the greater expertise 20 with respect to the pharmaceutical 21 industry? 22 MR. SOBOL: Objection to the</p>	<p style="text-align: right;">80</p> <p>1 bring to this industry, and what 2 Dr. Schondelmeyer brings is from a 3 slightly different perspective, rooted in 4 pharmacology, but it still extends beyond 5 that to the economic structures that he 6 renders opinions about. 7 Q. Well, as to any fact in connection with 8 the industry, would you defer to 9 Dr. Schondelmeyer if his understanding of 10 the facts was different from yours? 11 MR. SOBOL: Objection -- 12 A. It is not clear -- 13 MR. SOBOL: -- to form. 14 A. -- to me. It would depend on the facts. 15 It would depend on the situation. 16 Q. Have you read his declaration in this 17 case? 18 A. I have reviewed it. 19 Q. Okay. Is there anything in his 20 declaration that you disagree with? 21 MR. SOBOL: Objection. 22 A. I --</p>
<p style="text-align: right;">79</p> <p>1 form. 2 A. The -- Dr. Schondelmeyer's qualifications 3 as I understand them is that his -- his 4 teaching and his professorship is in a 5 department of pharmacology, and so the -- 6 his -- the focus of his study is on 7 pharmacy-related issues, the extent to 8 which they go to the institutions and the 9 economics of insurers and PBMs, and he is 10 certainly expert enough to provide an 11 opinion, but I don't know -- I don't know 12 -- I don't know enough about his 13 background to say he is an expert on those 14 institutions. 15 Any -- any economist who is 16 trained in microeconomics and industrial 17 organization is generally asked to come to 18 markets that are widely different, and the 19 training is such that one understands that 20 institutions impact the operations of 21 economic principles and practices, and 22 that -- that level of expertise is what I</p>	<p style="text-align: right;">81</p> <p>1 MR. SOBOL: Wait. I think that 2 if you are going to ask him that question 3 you ought to put the document before him 4 and give him an opportunity to read it. 5 MR. EDWARDS: Sure. Well, let 6 me reframe the question. 7 MR. SOBOL: Or you can do that. 8 BY MR. EDWARDS: 9 Q. This question goes to -- 10 MR. SOBOL: He is not going to 11 answer the question without reading it 12 first. 13 THE WITNESS: Reading it 14 thoroughly. 15 Q. This question goes to your recollection, 16 Dr. Hartman. Do you recall whether when 17 you read Dr. Schondelmeyer's declaration 18 there was anything in it that you 19 disagreed with? 20 MR. SOBOL: Objection to the 21 form. 22 A. With -- I reviewed his declaration,</p>

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22 (Pages 82 to 85)

<p style="text-align: right;">82</p> <p>1 somewhat quickly, and I -- and so I -- I</p> <p>2 did not get to the level of individual</p> <p>3 specific facts, any individual specific</p> <p>4 facts, that I found contradicted anything</p> <p>5 that I believed. But, as I say, I read it</p> <p>6 in a somewhat cursory fashion, and if we</p> <p>7 are going to get down to a specific</p> <p>8 sentence or paragraph, you need to put it</p> <p>9 in front of me.</p> <p>10 Q. Well, we may get there eventually, but I</p> <p>11 think you have answered my question for</p> <p>12 now. You have also read the paper he</p> <p>13 recently wrote with --</p> <p>14 MR. SOBOL: Ms. Wrobel.</p> <p>15 MR. EDWARDS: Right.</p> <p>16 Q. -- Ms. Wrobel, Marion Wrobel?</p> <p>17 A. I have.</p> <p>18 Q. And you rely on that in your report?</p> <p>19 Correct?</p> <p>20 A. I do.</p> <p>21 Q. And is there anything in that paper that</p> <p>22 you disagree with --</p>	<p style="text-align: right;">84</p> <p>1 Q. Okay. Okay. Has a court ever criticized</p> <p>2 your work in any way to your knowledge?</p> <p>3 A. I know a number of laudatory things said,</p> <p>4 but I know of no criticism. I would be</p> <p>5 glad to put forward laudatory examples, if</p> <p>6 you would like.</p> <p>7 Q. Well, we will let Mr. Sobol get into that</p> <p>8 subject on his nickel.</p> <p>9 What I want you to do is turn to</p> <p>10 your declaration now. Take a look at</p> <p>11 paragraph 7.</p> <p>12 (Witness complying.)</p> <p>13 Q. You see in the second sentence you say, "I</p> <p>14 have been asked to analyze whether</p> <p>15 causation, injury, and liability can be</p> <p>16 proven on a classwide basis."</p> <p>17 Have you been asked to give</p> <p>18 separate opinions on each of those</p> <p>19 elements?</p> <p>20 A. I have -- I have certainly been asked to</p> <p>21 assume the liability as expressed in the</p> <p>22 allegations and as laid out in the</p>
<p style="text-align: right;">83</p> <p>1 MR. SOBOL: Well, again --</p> <p>2 Q. -- if you recall?</p> <p>3 MR. SOBOL: I want the record to</p> <p>4 reflect that the document is not in front</p> <p>5 of the witness.</p> <p>6 A. For me to specifically respond to that, I</p> <p>7 would like to read it closely again. I</p> <p>8 can't recall. I read that a month or two</p> <p>9 ago. I used it to give a -- to help</p> <p>10 explicate a -- the structure of the</p> <p>11 market.</p> <p>12 Q. You don't recall anything that you</p> <p>13 disagreed with in that paper I take it?</p> <p>14 A. No.</p> <p>15 Q. Have you ever been subject to a Dalbert</p> <p>16 motion?</p> <p>17 A. I thought lawyers tried to Dalbert every</p> <p>18 economist that ever went to a deposition.</p> <p>19 Q. I take it the answer to that is yes?</p> <p>20 A. Yes.</p> <p>21 Q. Has one ever been granted?</p> <p>22 A. No.</p>	<p style="text-align: right;">85</p> <p>1 allegations. I have been asked to, given</p> <p>2 those allegations, and accepting them as</p> <p>3 true, I have been asked whether liability,</p> <p>4 causation, which I take to be impact,</p> <p>5 injury, and damages can be and should be</p> <p>6 proven on a classwide basis. So I have</p> <p>7 thought about each of those separately and</p> <p>8 jointly.</p> <p>9 Q. And are there separate opinions for each</p> <p>10 of those elements --</p> <p>11 A. No.</p> <p>12 Q. -- in your declaration? What you are</p> <p>13 saying is the general opinion stated in</p> <p>14 your declaration covers all three</p> <p>15 elements?</p> <p>16 A. The -- I would look to see where I have</p> <p>17 stated exactly the set of conclusions and</p> <p>18 how it covers it.</p> <p>19 (Pause.)</p> <p>20 (The witness viewing Exhibit</p> <p>21 No. 002.)</p> <p>22 A. I would say that looking at paragraphs 10</p>

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23 (Pages 86 to 89)

<p style="text-align: right;">86</p> <p>1 and 11 fully summarize the conclusions to</p> <p>2 which I come regarding each jointly and</p> <p>3 severally for those issues.</p> <p>4 Q. Okay. Where in this declaration do you</p> <p>5 render an opinion with respect to</p> <p>6 liability?</p> <p>7 MR. SOBOL: Objection to the</p> <p>8 form.</p> <p>9 You can answer.</p> <p>10 A. The -- again the -- I have taken liability</p> <p>11 to mean impact in my interpretation.</p> <p>12 Q. Okay.</p> <p>13 A. And the fact that there is a commonality,</p> <p>14 that the alleged AWP scheme was</p> <p>15 implemented through inflating an AWP,</p> <p>16 which is common to all units of every NDC,</p> <p>17 of every drug sold nationwide, and the</p> <p>18 fact that the discounts were offered and</p> <p>19 the fact that the spread, that that led to</p> <p>20 a spread that was well beyond what would</p> <p>21 be reasonably expected in this market, is</p> <p>22 the basis for the fact that the impact was</p>	<p style="text-align: right;">88</p> <p>1 assume, but I don't take what I have done</p> <p>2 as a report on liability proving those</p> <p>3 allegations. I have merely assumed those</p> <p>4 allegations for purposes of this report.</p> <p>5 Q. Have you talked to any class members to</p> <p>6 determine whether the facts alleged in the</p> <p>7 Complaint are true?</p> <p>8 A. I can't recall.</p> <p>9 Q. Do you recall that in your deposition in</p> <p>10 the Lupron case you testified that if</p> <p>11 someone knows the true facts then there</p> <p>12 would not be a misrepresentation?</p> <p>13 MR. SOBOL: Objection to the</p> <p>14 form.</p> <p>15 A. You would have to show me the transcript</p> <p>16 in the full --</p> <p>17 Q. Well --</p> <p>18 A. I mean I don't know what --</p> <p>19 Q. Well, do you agree with that proposition?</p> <p>20 If somebody knows the true facts, then</p> <p>21 there cannot be a misrepresentation?</p> <p>22 MR. SOBOL: Objection to the</p>
<p style="text-align: right;">87</p> <p>1 classwide, and it is -- that's my</p> <p>2 understanding of liability.</p> <p>3 Q. So you are assuming the facts alleged in</p> <p>4 the Complaint to be true and you're</p> <p>5 looking at impact? Is that correct?</p> <p>6 A. I have laid out my understanding of the</p> <p>7 allegations in paragraph 8, and that's --</p> <p>8 that is my summary of the allegations, and</p> <p>9 I'm assuming that they're true. I am</p> <p>10 assuming --</p> <p>11 Q. You are --</p> <p>12 A. -- that this scheme existed, and I am -- I</p> <p>13 -- and I'm assuming that -- I am -- I</p> <p>14 understand that the evidence will be</p> <p>15 brought forward to -- directed at proving</p> <p>16 those allegations, that I'm not being</p> <p>17 asked to do that, but in the process of</p> <p>18 doing what I'm doing, I'm looking for</p> <p>19 corroboratory evidence of the allegations,</p> <p>20 and I find that the facts in evidence that</p> <p>21 I have been able to review to date</p> <p>22 corroborate what I have been asked to</p>	<p style="text-align: right;">89</p> <p>1 form.</p> <p>2 A. Well, if -- my understanding of that</p> <p>3 question is -- is that it is a legal</p> <p>4 matter. What is a fraudulent</p> <p>5 misrepresentation or a concealment of</p> <p>6 factual information that redounds to the</p> <p>7 damage to a group of individuals or</p> <p>8 entities, it is my understanding that</p> <p>9 under the RICO statutes that is an</p> <p>10 illegality, and so that the</p> <p>11 misrepresentation is the basis for the</p> <p>12 illegality.</p> <p>13 Now whether under RICO people --</p> <p>14 there was no misrepresentation, I don't</p> <p>15 know. That is something for lawyers to</p> <p>16 argue.</p> <p>17 Q. Are you saying that economic theory does</p> <p>18 not address the issue of whether there is</p> <p>19 fraud?</p> <p>20 MR. SOBOL: Objection to the</p> <p>21 form.</p> <p>22 A. Could you repeat that question?</p>



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<p style="text-align: right;">90</p> <p>1 MR. EDWARDS: I will have the 2 reporter read it back. 3 (The pending question and 4 objection were then read.) 5 A. Well, fraud -- as an economist, I can 6 think of no textbook that has a chapter on 7 fraud. The -- obviously if there are 8 economic interactions and the participants 9 in a given market rely on certain 10 information, and information is a good 11 thing in economic markets for consumers, 12 and if they come to rely on that, and it 13 turns out that what they have relied on 14 has been misrepresented or fraudulently 15 concealed in some way, that does harm to 16 the persons and the entities in that 17 market that rely on that information. 18 Now as a threshold, an economic 19 threshold of something being fraud, that 20 seems to me to be a legal matter. That is 21 not something that I as an economist have 22 rendered an opinion here.</p>	<p style="text-align: right;">92</p> <p>1 were expectations, and it revealed -- and 2 that the facts deviated very considerably 3 from the expectations that she had as to 4 the meaning of AWP and what it meant. 5 Q. So your opinion in this case is based on 6 one deposition? 7 A. No. I have looked at other depositions, 8 and, you know, I have -- certainly in 9 terms of doing the damage analysis, this 10 is much of what appears here is 11 illustrative and how it will be done, and 12 it is drawn from surveys that are publicly 13 known and are diffused within the 14 participants of this market with -- 15 apparently with a great lag. But 16 obviously during the damage phase of this, 17 I'm going to have to talk to a lot of Blue 18 Cross Blue Shield administrators and 19 people at Cigna and Aetna and a variety of 20 places. 21 Q. And if there are depositions of class 22 members who have testified that they were</p>
<p style="text-align: right;">91</p> <p>1 I have taken the allegations of 2 fraud and seen what the implications are 3 relative to relationships between 4 benchmark prices and transactions prices, 5 and lo and behold, I see very large 6 deviations from what persons in the market 7 expected the information to mean, and it 8 affected the way they behaved and how they 9 -- how they interpreted the price signals 10 to their detriment. 11 Q. Have you ever talked to any persons in the 12 market about what they expected the 13 information to mean? 14 A. Well, I read a portion of the deposition 15 of the -- I think it was the -- there was 16 one of the senior administrators of Blue 17 Cross Blue Shield of Montana, and my 18 recollection of what her understanding of 19 AWP is was that it was an average 20 wholesale price, and that it reflected an 21 acquisition cost to providers in the 22 market, and it revealed a -- that there</p>	<p style="text-align: right;">93</p> <p>1 not misled and they understood the true 2 facts, does that impact your opinion in 3 any way? 4 MR. SOBOL: Objection to the 5 form. 6 A. And what are the -- I'm -- what are you 7 saying are the true facts? 8 Q. What are you saying are the true facts? 9 A. I am saying -- 10 MR. SOBOL: Objection to the 11 form. 12 Q. You can't answer my question? 13 MR. SOBOL: Objection to that -- 14 to the form of that question also. 15 THE WITNESS: Yes. 16 MR. SOBOL: I haven't a clue 17 what the question is right now. 18 THE WITNESS: Why don't -- 19 BY MR. EDWARDS: 20 Q. If a witness has testified in this case 21 that they were not misled, is that of 22 interest to you at all?</p>

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<p style="text-align: right;">94</p> <p>1 MR. SOBOL: Well, objection.</p> <p>2 Will you provide him the deposition? And</p> <p>3 he can look at it and make -- and answer</p> <p>4 the question.</p> <p>5 A. I will --</p> <p>6 MR. SOBOL: Well, I have got a</p> <p>7 question.</p> <p>8 Q. You may answer the question.</p> <p>9 MR. SOBOL: All right.</p> <p>10 Q. It is an objection to the form.</p> <p>11 A. During the damage phase of this, should we</p> <p>12 get to damages, these are precisely the</p> <p>13 kinds of depositions that I need -- that I</p> <p>14 have asked counsel to notice and to take,</p> <p>15 and that I'm going to want to -- I'm going</p> <p>16 to want to review.</p> <p>17 Now you are saying if someone in</p> <p>18 the deposition says they know the true</p> <p>19 facts, does that mean that they weren't</p> <p>20 misled or that -- that there was no fraud?</p> <p>21 The woman whose deposition for Blue Cross</p> <p>22 and Blue Shield of Montana thought she</p>	<p style="text-align: right;">96</p> <p>1 those things, all of those variables that</p> <p>2 you just mentioned in your answer, and</p> <p>3 states that they were not misled, does</p> <p>4 that have an impact on your opinion?</p> <p>5 MR. SOBOL: Objection to the</p> <p>6 form.</p> <p>7 A. The -- I am going to have to review it and</p> <p>8 be able to pose, in reviewing it, be able</p> <p>9 to pose my own questions. I mean someone</p> <p>10 can state they're not being misled, but I</p> <p>11 need to see what they were asked to see</p> <p>12 whether they were being misled or not.</p> <p>13 Q. So it could have an impact on your</p> <p>14 opinion?</p> <p>15 A. The --</p> <p>16 MR. SOBOL: Objection to the</p> <p>17 form.</p> <p>18 A. The -- my opinion that -- the allegations</p> <p>19 that I have been asked to assume and which</p> <p>20 I have corroborated, through the evidence</p> <p>21 that I have been able to review and</p> <p>22 corroborate, indicate -- have led me to</p>
<p style="text-align: right;">95</p> <p>1 knew the real -- the true facts. She</p> <p>2 didn't.</p> <p>3 In order for one to know the</p> <p>4 true facts, whether you are of any --</p> <p>5 whether you are Cigna, whether you are as</p> <p>6 well informed as someone from Cigna or</p> <p>7 Aetna or you are someone who is not</p> <p>8 well-informed, in order to know the true</p> <p>9 facts, you are going to need to know all</p> <p>10 of the -- all of the discounts, all of the</p> <p>11 price offsets, all of the side payments.</p> <p>12 You are going to need to have an</p> <p>13 understanding of what the actual</p> <p>14 acquisition cost or the ASP is in order to</p> <p>15 come to some conclusion of whether the AWP</p> <p>16 is a reasonable signal. And I have --</p> <p>17 some people will -- there may be</p> <p>18 differences in the quanta of the extent of</p> <p>19 the impact of the fraud for different</p> <p>20 people, but -- and that will be determined</p> <p>21 by how much they truly understand.</p> <p>22 Q. Well, if somebody testifies to all of</p>	<p style="text-align: right;">97</p> <p>1 the conclusion that there was causation,</p> <p>2 there was impact, it was classwide, there</p> <p>3 was injury, and there was damages.</p> <p>4 What you are getting at right</p> <p>5 now is what was the quanta of that, of</p> <p>6 those damages or those -- of those</p> <p>7 injuries, and to -- that quanta may differ</p> <p>8 depending on what people thought they knew</p> <p>9 or how much they thought they were being</p> <p>10 misled or whether they were being misled</p> <p>11 or not, and that is something that has to</p> <p>12 be addressed at an allocation phase, and</p> <p>13 it is something that can't be ignored, but</p> <p>14 it doesn't change my opinion as to</p> <p>15 classwide causation or impact.</p> <p>16 Q. You are saying that even if someone was</p> <p>17 not misled, there could still be impact?</p> <p>18 MR. SOBOL: Objection to the</p> <p>19 form.</p> <p>20 Q. Is that your opinion?</p> <p>21 A. It's --</p> <p>22 MR. SOBOL: Objection to the</p>

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<p style="text-align: right;">98</p> <p>1 form. Not misled about what?</p> <p>2 A. You have just said "not misled," and I</p> <p>3 need to see what -- I need to -- what you</p> <p>4 are characterizing as not being misled, I</p> <p>5 have to see what leads to that conclusion</p> <p>6 and what they knew, and someone could</p> <p>7 claim that they were not being misled</p> <p>8 about weapons of mass destruction, and</p> <p>9 they didn't know. So, you know, it's -- I</p> <p>10 need to -- that needs to be reviewed by me</p> <p>11 in a way that I can -- I can probe to see</p> <p>12 whether they really were misled. They may</p> <p>13 not think they have been misled.</p> <p>14 Q. You need to understand the facts and</p> <p>15 circumstances related to each class member</p> <p>16 to determine whether they were in fact</p> <p>17 misled?</p> <p>18 MR. SOBOL: Objection --</p> <p>19 Q. Correct?</p> <p>20 MR. SOBOL: -- to the form.</p> <p>21 A. No.</p> <p>22 Q. I thought you just said you would have to</p>	<p style="text-align: right;">100</p> <p>1 they are seeing some ASPs; they are seeing</p> <p>2 some information. They have some idea,</p> <p>3 better than someone who is running Blue</p> <p>4 Cross Blue Shield in Montana has. But</p> <p>5 they don't have -- they don't have retail</p> <p>6 chains. They don't understand the</p> <p>7 discounts. They don't understand the full</p> <p>8 extent of all the information that is</p> <p>9 required to fully know the acquisition</p> <p>10 cost that for which the AWP is a signal.</p> <p>11 And what I'm saying is the extent to which</p> <p>12 they have knowledge needs to be</p> <p>13 ascertained, and that will affect the</p> <p>14 quanta of how they're impacted.</p> <p>15 But it doesn't change the fact,</p> <p>16 even if you have got somebody that well</p> <p>17 informed, that they have been impacted.</p> <p>18 It is the degree and the amount to which</p> <p>19 they have been impacted that will -- that</p> <p>20 will be informed by the kinds of</p> <p>21 depositions that you're talking about and</p> <p>22 the kinds of information that would come</p>
<p style="text-align: right;">99</p> <p>1 read their testimony and understand</p> <p>2 exactly what they said in order to form a</p> <p>3 view as to whether it affects your</p> <p>4 opinion?</p> <p>5 A. No. What I said was my opinions as to</p> <p>6 causation, impact, injury, and damages</p> <p>7 holds regardless of what I find in those</p> <p>8 -- in those depositions. What that will</p> <p>9 affect is the quanta of the injury across</p> <p>10 the class members.</p> <p>11 Q. How can somebody be injured if they, by</p> <p>12 fraud, if they were not misled?</p> <p>13 MR. SOBOL: Objection to the</p> <p>14 form.</p> <p>15 A. If someone fully knew -- and if as I'm --</p> <p>16 as I'm looking at the class -- suppose the</p> <p>17 class is certified and we have the class</p> <p>18 as a whole, and I am able to go to a very</p> <p>19 well-informed third-party payer. Let's</p> <p>20 take Cigna, for example. They have got a</p> <p>21 PBM. They have got a mail order facility.</p> <p>22 So they have some idea of what, you know,</p>	<p style="text-align: right;">101</p> <p>1 forth in those depositions.</p> <p>2 Q. Why don't I put it to you very simply,</p> <p>3 Dr. Hartman. Are you saying as a</p> <p>4 professional economist that a person can</p> <p>5 suffer injury if they have not been</p> <p>6 misled?</p> <p>7 MR. SOBOL: Objection to the</p> <p>8 form.</p> <p>9 Q. And if you are saying that, then I want to</p> <p>10 know the basis for that opinion.</p> <p>11 MR. SOBOL: Objection to the</p> <p>12 form.</p> <p>13 A. Well, let me -- let me parse your</p> <p>14 definition of "not being misled."</p> <p>15 If we have the totality -- if</p> <p>16 you are saying by "not being misled" they</p> <p>17 were not injured, then by definition, if</p> <p>18 they knew enough not to be injured, then</p> <p>19 the measure of their damages -- their</p> <p>20 injury is zero, in measuring the quanta of</p> <p>21 their damages, if they knew everything</p> <p>22 that was needed to be known.</p>

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<p style="text-align: right;">102</p> <p>1 Q. And if there is no damage, there is no 2 impact?</p> <p>3 A. No. There is impact.</p> <p>4 MR. SOBOL: Objection.</p> <p>5 Q. How is there impact if there is no damage?</p> <p>6 A. The -- this is -- this is a group of 7 purchasers -- the classes are all subject 8 and impacted by the AWP scheme since 9 they're all looking at the same AWP. They 10 -- and since there are discounts that have 11 been offered that drive that, the 12 acquisition cost to -- to the system well 13 below that AWP and well below the 14 expectations that have been formed over 20 15 years in this market in relationship to 16 that benchmark price, the -- I have now 17 forgotten the question.</p> <p>18 THE WITNESS: Could you? 19 (The pending question was then 20 read.)</p> <p>21 THE WITNESS: Okay. Thank you.</p> <p>22 A. The mere fact there is a manipulation of</p>	<p style="text-align: right;">104</p> <p>1 form.</p> <p>2 A. I define "impact" as I have been asked to 3 assume that there was certain illegal 4 behavior. That illegal behavior involved 5 fraudulently inflating an AWP, and at the 6 same time, offering substantial rebates, 7 discounts, invoice price offsets, off 8 invoice price offsets, sometimes hidden 9 price offsets and blandishments.</p> <p>10 Q. So you don't mean negative impact then?</p> <p>11 A. I mean impact that since that forms the 12 basis, these -- these God-like third-party 13 payers that you are talking about see the 14 inflation. They are impacted by it. They 15 have to do something about it.</p> <p>16 Q. When you talk about impact in your 17 declaration, you are talking about benign 18 impact as well as negative impact?</p> <p>19 MR. SOBOL: Objection.</p> <p>20 Q. Is that what you're saying?</p> <p>21 MR. SOBOL: Objection.</p> <p>22 A. I wouldn't call it benign.</p>
<p style="text-align: right;">103</p> <p>1 this AWP impacts every transaction to 2 which the AWP is subject to, and so it is 3 going to impact everybody.</p> <p>4 Now to the extent that it 5 damaged -- that damages them and injures 6 them will be determined to the extent by 7 which they had information and could 8 essentially deal with the scheme and not 9 be -- not be injured or diminish the 10 amount of the injury, and if they are 11 God-like and they know everything, and the 12 evidence I have seen to date indicates 13 that there was no such third-party payer 14 that exists, but if God were running one 15 of these third-party payers and knew 16 everything, then he would be impacted by 17 it. He is still facing a fraudulently 18 concealed AWP, but he can mitigate -- he 19 can mitigate that impact such that the 20 injury is driven to zero.</p> <p>21 Q. How do you define "impact" in that answer?</p> <p>22 MR. SOBOL: Objection to the</p>	<p style="text-align: right;">105</p> <p>1 MR. SOBOL: Wait. I had an 2 objection to the form of the question, and 3 if there is going to be a colloquy between 4 the questioner and the answerer, you ought 5 to give the stenographer time to write the 6 question down, there be an opportunity for 7 counsel to interpose their objection or 8 not, and then there be an answer.</p> <p>9 THE WITNESS: He is good. You 10 know? He is --</p> <p>11 MR. EDWARDS: The voice of 12 reason.</p> <p>13 THE WITNESS: He is the voice of 14 reason.</p> <p>15 BY MR. EDWARDS:</p> <p>16 Q. Look, I am not an economist, but I am 17 wondering if you can refer me to some 18 authorities which will help me understand 19 how you can have negative impact from a 20 fraud where there is no damage.</p> <p>21 A. The --</p> <p>22 Q. Can you cite me any authorities?</p>

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<p style="text-align: right;">106</p> <p>1 A. Well, but the -- when -- when I'm -- when 2 I'm reading the, what I have been asked to 3 analyze, I have been asked to analyze 4 causation, which I take to be impact, 5 injury, and damages, and the -- I haven't 6 been asked to find for all class members 7 negative impact. I am looking for 8 classwide impact, and that is going to 9 differ across class members. There is no 10 denying that. 11 Q. What you are saying is that some class 12 members inevitably will not have suffered 13 any negative impact? 14 MR. SOBOL: Objection. 15 A. No. I am not saying that at all. 16 Q. You are saying you have to look at the 17 individual -- 18 MR. SOBOL: Objection. Both of 19 you -- I am going to insist from the 20 witness, too. When a question is asked, 21 there should be a pace, and I will object 22 or not, and then there will be an answer,</p>	<p style="text-align: right;">108</p> <p>1 There is no reason for people to 2 be racing through questions and answers in 3 this deposition. You have another day and 4 a half. 5 MR. EDWARDS: Well, unlike you, 6 I am going to let the judge rule on your 7 motion to strike. 8 BY MR. EDWARDS: 9 Q. But I take it, Dr. Hartman, what you are 10 saying is you would want to look at the 11 facts and circumstances with respect to 12 each individual class member to determine 13 whether there has been a negative impact, 14 because in some cases, there could be, and 15 in some cases, there might not be; 16 correct? 17 A. That is -- that is not what I said at all. 18 Q. Let me ask you to take a look at your 19 testimony in the Lupron case. It is your 20 deposition dated May 25, 2004. 21 MR. EDWARDS: We will mark this 22 as Exhibit 4.</p>
<p style="text-align: right;">107</p> <p>1 from both of you. 2 BY MR. EDWARDS: 3 Q. What you are saying is you would have to 4 look at -- 5 MR. SOBOL: Now I object to the 6 last question that was posed. If it is 7 being withdrawn, you can tell me if it is 8 withdrawn? Are you going to ask another 9 question? 10 MR. EDWARDS: I think I got an 11 answer to the question. 12 Q. What you are saying then is -- 13 MR. SOBOL: Then I object and I 14 move to strike. 15 THE WITNESS: Right. 16 MR. SOBOL: The answer, if in 17 fact there was -- I don't know -- I 18 haven't gone into the record whether there 19 was an answer or not, because again I will 20 insist that the questioner and the 21 answerer give Mr. Sobol a chance to 22 interpose his objections.</p>	<p style="text-align: right;">109</p> <p>1 (Transcript of deposition of 2 Raymond S. Hartman, taken 3 May 25, 2004, marked 4 Exhibit Hartman 004 for 5 identification.) 6 MR. SOBOL: Can we put on the 7 record my understanding is that counsel 8 for the defendants in the AWP MDL have 9 obtained the assent of all defendants in 10 the Lupron MDL for the disclosure of this 11 information in the AWP MDL. 12 MR. EDWARDS: That's my 13 understanding. 14 MR. SOBOL: And I also would at 15 least anticipate that then the Exhibit 4 16 is to be subject to the confidentiality 17 order entered in the AWP MDL. I don't 18 know whether Tapp insisted on that or not, 19 but I am assuming that is the case, and 20 therefore, we should designate it as such. 21 MR. EDWARDS: So designated. 22 BY MR. EDWARDS:</p>



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<p style="text-align: right;">110</p> <p>1 Q. Do you recall testifying in a deposition 2 in the Lupron case on or about May 25, 3 2004? 4 A. Yes. 5 Q. I want you to turn to your testimony at 6 pages 157 and 158. 7 (Witness complying.) 8 Q. Beginning at line 21 on page 157, 9 Mr. Daley states: 10 "Question: Now if you had been 11 with me driving in the car when I had the 12 accident and gone with me to get it 13 repaired and the body work and the paint 14 job and everything else, if we assume 15 that, and then you were buying my car, 16 and you asked me if I had any damage, 17 and I said no, would that be a 18 misrepresentation? 19 "THE WITNESS: In other words, 20 if I knew everything you knew, would there 21 be a misrepresentation? 22 "Question: Yes.</p>	<p style="text-align: right;">112</p> <p>1 asking him questions when he is in the 2 middle of reviewing his testimony, how do 3 you expect him to review his testimony, 4 Steve? 5 THE WITNESS: Give me a break. 6 Let me look at this. 7 (Further pause.) 8 (The witness continues to review 9 Exhibit No. 004.) 10 A. I agree with my testimony as laid out in 11 that. 12 Q. And is it still true today? 13 A. It is. 14 Q. And would you agree that if a class member 15 knew what the average selling price was 16 for a particular drug, there would not be 17 any causation -- 18 MR. SOBOL: Objection to the 19 form. 20 Q. -- or impact? 21 MR. SOBOL: Objection to the 22 form.</p>
<p style="text-align: right;">111</p> <p>1 "Answer: No." 2 Was that testimony true when you 3 gave it? 4 A. In coming to an answer to your question, I 5 am just going to read the context in which 6 this answer is given 7 (Pause.) 8 (The witness viewing Exhibit 9 No. 004.) 10 Q. Do you need more time? 11 A. I'll let you know as soon as I am ready. 12 Q. Well, we have already been at least a 13 minute. Is this a tough question? 14 A. No. I want to see the context. I am 15 reading three or four pages beforehand and 16 a little bit afterwards to see the context 17 in which I gave the answer, seeing if 18 there is other good stuff in here. 19 Q. Look, if this question is too difficult 20 for you to answer, we can go on to another 21 question. 22 MR. SOBOL: If you keep on</p>	<p style="text-align: right;">113</p> <p>1 A. What I have said is in re the car example, 2 if someone at Cigna were sitting on -- 3 with the pricing group, the strategic 4 pricing group at Bristol-Myers Squibb or 5 at GSK or at any other drug manufacturer, 6 and had a full understanding of what ASP 7 was and how AWP was inflated relative to 8 that ASP through the various distribution 9 channels through which that drug may be 10 reimbursed and essentially knew 11 everything, then the -- that person would 12 be -- would understand the 13 misrepresentation that was going on, would 14 understand the impact, would be subject to 15 the impact, but would be able to mitigate 16 any injury therefrom. 17 Q. Are you saying that the only way to avoid 18 impact is to have perfect knowledge? 19 MR. SOBOL: Objection to the 20 form. 21 A. I'm -- 22 Q. In other words, anybody in any industry</p>

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<p style="text-align: right;">114</p> <p>1 who doesn't have perfect knowledge has 2 been defrauded? Is that your economic 3 theory here? 4 MR. SOBOL: Objection to the 5 form. 6 A. No. 7 Q. There are many markets in which people 8 don't have perfect knowledge? 9 A. That's correct. 10 Q. Are you familiar with the concept of the 11 efficient market as it is used in 12 securities cases? 13 A. I'm not an expert in it, but I -- I have a 14 -- a basic understanding of it. 15 Q. What do you understand it to mean? 16 A. Well, in -- with regard to securities -- 17 the pricing of securities, when you have 18 enough people buying and selling a given 19 security based on all the information that 20 the various people have, that the 21 securities market will be the most 22 efficient way of incorporating all of the</p>	<p style="text-align: right;">116</p> <p>1 MR. SOBOL: Objection to the 2 form. 3 A. There is an area of -- there are sets of 4 markets that constitute the distribution 5 of pharmaceutical products from 6 manufacturers to the ultimate consumers, 7 and those markets may be as small as the 8 market for a given molecule in evaluating 9 certain kinds of economic events or 10 alleged violations, but I'm looking at the 11 global -- I am looking in the context of 12 the structure as laid out in Attachment C 13 as discussed by Schondelmeyer and Wrobel 14 in their Abt Associates' report, which 15 consists of the flow of all 16 pharmaceuticals from all manufacturers 17 through the distribution chains, through 18 the intermediaries, to the final 19 consumers, and then the reverse flow of 20 financial payments. 21 Q. How many markets are there in this case? 22 MR. SOBOL: Objection to form.</p>
<p style="text-align: right;">115</p> <p>1 information that is in the market into the 2 pricing of a particular equity. 3 Q. And is the market that you are studying in 4 connection with this case an efficient 5 market? 6 MR. SOBOL: Objection to the 7 form. 8 A. I would say no. 9 Q. Okay. By the way, what is the market that 10 you are studying in this case, or are 11 there many markets? 12 MR. SOBOL: Objection to the 13 form. 14 A. And are you -- what -- your definition of 15 "market" is what? Under the merger 16 guidelines or -- 17 Q. I don't know. Do economists ever use the 18 term "market"? 19 A. Sure. They use it in a lot of different 20 ways. 21 Q. Okay. How would you use it in connection 22 with this case?</p>	<p style="text-align: right;">117</p> <p>1 A. Innumerable. 2 Q. And the thing that causes you as an 3 economist to state that opinion is the 4 fact that there are differences among 5 various drugs and various methods of 6 distribution and various methods of 7 payment? Is that correct? 8 A. Well, I don't know if -- 9 MR. SOBOL: Objection to the 10 form. 11 A. There is -- those differences exist. I 12 don't know if that's the reason I have 13 said there are different markets, but. 14 Q. Well, one reason you would draw the 15 conclusion that two products are not in 16 the same market is because there are 17 differences between the two products? 18 Right? 19 A. Well, the -- 20 Q. The ultimate situation in which you have 21 got two products in the same market is 22 where the two products are exactly the</p>

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<p style="text-align: right;">118</p> <p>1 same? Right?</p> <p>2 A. You are done?</p> <p>3 Q. Yes.</p> <p>4 A. Okay.</p> <p>5 The -- let's take an example</p> <p>6 that is orthogonal to the distribution</p> <p>7 scheme and reimbursement and a variety of</p> <p>8 things. One can analyze whether different</p> <p>9 molecules or different groups of molecules</p> <p>10 as identified by IMS constitute antitrust</p> <p>11 markets and whether they're subject to the</p> <p>12 kinds of violations that are alleged under</p> <p>13 Hatch-Waxman. Now that -- those kinds of</p> <p>14 allegations and that kind of analysis of</p> <p>15 the market go on regardless of the</p> <p>16 distribution chains that we're talking</p> <p>17 about here in Schondelmeyer and Wrobel.</p> <p>18 The fact is there is substitution among</p> <p>19 products. Whether they are bioequivalent,</p> <p>20 whether they are therapeutically</p> <p>21 equivalent, all of these things play into</p> <p>22 the definition of a market. And so if one</p>	<p style="text-align: right;">120</p> <p>1 practices.</p> <p>2 Q. You mentioned IMS. What is IMS?</p> <p>3 A. IMS is a -- a data -- is a group that</p> <p>4 gathers data on -- it is a -- it provides</p> <p>5 information on a variety of different</p> <p>6 types of products, prices, at retail, at</p> <p>7 -- at wholesale, distributions of</p> <p>8 consumption across states for different</p> <p>9 drugs. It provides information about the</p> <p>10 industry.</p> <p>11 Q. To whom?</p> <p>12 A. Anybody that is willing to pay for it.</p> <p>13 Q. And is it the case that IMS data can be</p> <p>14 used to determine discounts given to</p> <p>15 different classes of trade in the</p> <p>16 pharmaceutical business, such as</p> <p>17 hospitals, HMOs, mail order, pharmacies,</p> <p>18 government programs?</p> <p>19 MR. SOBOL: Objection to the</p> <p>20 form.</p> <p>21 You can answer.</p> <p>22 A. The IMS, as its competitor Scott Levin</p>
<p style="text-align: right;">119</p> <p>1 wanted to get down to the very microlevel</p> <p>2 of different kinds of classes of drugs and</p> <p>3 then different drugs within -- there must</p> <p>4 be 22 classes of antihypertensives, and</p> <p>5 all of them may constitute a market, all</p> <p>6 of them different markets. Each of the</p> <p>7 molecules may constitute different</p> <p>8 markets.</p> <p>9 Q. Would you agree with me that the</p> <p>10 pharmaceutical industry is complex and has</p> <p>11 a multiplicity of distribution and payment</p> <p>12 entities?</p> <p>13 A. God, that sounds familiar.</p> <p>14 I would agree that, as many</p> <p>15 markets in modern industrial countries,</p> <p>16 this is a -- this is a -- this is a</p> <p>17 complicated market. I wouldn't say it is</p> <p>18 more complicated than other markets, but</p> <p>19 it is -- it has -- it has distinct issues</p> <p>20 and structural variations that need to be</p> <p>21 accounted to -- for, and can be accounted</p> <p>22 for using standard economic methods and</p>	<p style="text-align: right;">121</p> <p>1 that has recently been acquired by</p> <p>2 Verispan, another data group, provide a</p> <p>3 variety of surveys or products that focus</p> <p>4 on different classes of trades or</p> <p>5 different groups, and one can go to the</p> <p>6 IMS and as a client say, "I want an</p> <p>7 analysis of reimbursement rates in this</p> <p>8 class of trade," or one can do a variety</p> <p>9 of things.</p> <p>10 Q. One can go to IMS and get a sense of the</p> <p>11 extent to which different classes of trade</p> <p>12 are getting prices below the published</p> <p>13 WAC? Isn't that true?</p> <p>14 MR. SOBOL: Objection to the</p> <p>15 form.</p> <p>16 A. One can go to IMS and get information</p> <p>17 summarizing the retail acquisition cost by</p> <p>18 certain classes of trade. I don't know</p> <p>19 how extensive, how many, whether it is all</p> <p>20 of them, but certainly retail pharmacies</p> <p>21 is one that I have made use of.</p> <p>22 Q. When you use the term "ASP" in your</p>



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<p style="text-align: right;">122</p> <p>1 declaration, are you talking about average 2 sales prices among all customer classes, 3 or do you think it is important to 4 distinguish between customer classes? 5 A. Well, I think -- at the -- as I deal with 6 it in my formulation, and in terms of a 7 signal for -- that the AWP is a signal for 8 transactions prices, i.e., average sale 9 price, I am taking it as an average sale 10 price across all classes. 11 Q. Okay. Even though Dr. Schonoldmeyer would 12 disagree with you on that? Isn't that 13 true? 14 MR. SOBOL: Objection to form. 15 A. I don't know. I don't -- I don't know 16 what he -- what his opinion -- before you 17 guys scurry to find it, let me -- it may 18 not be relevant. 19 I would not -- if he -- if his 20 -- if his contention is that there may be 21 different -- that their ASPs may vary 22 across classes of trade, I wouldn't</p>	<p style="text-align: right;">124</p> <p>1 injury? Is that correct? 2 A. The -- briefly put, that is correct. 3 Q. And injury is another way of saying 4 causation? Is that correct? 5 A. Causation and impact are classwide. 6 Injury is the result of that impact or 7 causation. 8 Q. Two sides of the same coin? 9 A. Well, I -- it's -- 10 Q. If there is no causation, you wouldn't 11 have injury? Right? 12 A. Well, if there is no allegations of any 13 kind of violations and there was no 14 illegality, you would have no impact or no 15 injury. So I agree with that. 16 Q. Now the but-for spread in your analysis 17 would be the difference between ASP and 18 the but-for AWP? Is that correct? 19 A. The measure of the but-for spread would be 20 based upon the -- a relationship to ASP, 21 as -- as expected, reasonably expected, by 22 the information available. If we're</p>
<p style="text-align: right;">123</p> <p>1 disagree with that, if that's what you are 2 going to turn to. 3 The -- I haven't read closely 4 enough his opinions as to how it differs, 5 the extent to which it differs, but it is 6 going to differ across classes of trade. 7 I am -- I am taking the average of those 8 averages across classes of trade. I am 9 taking an average for all units sold, 10 which summarizes again the average of the 11 averages, and I'm relating the -- I am 12 taking that as a measure of a real 13 transaction price, and estimating a WAC -- 14 a -- I am sorry -- a but-for ASP related 15 to that. And so the application, there is 16 not to be multiple AWP's. There is going 17 to be an AWP as a signal for the average 18 ASP, and then we know that ASPs will vary 19 among classes of trade. 20 Q. Your basic approach, as I understand it, 21 is to compare actual spreads to but-for 22 spreads to determine whether there was</p>	<p style="text-align: right;">125</p> <p>1 talking about efficient markets the -- 2 what information was available to people 3 generally, the -- it was -- the -- that is 4 the relationship for the but-for spread, 5 the but-for relationship, between AWP and 6 ASP. 7 Q. And the way you calculate the but-for 8 spread is you develop what you call an 9 expectation yardstick and you apply that 10 to the ASP to arrive at a but-for AWP? Is 11 that fair? 12 A. In the illustrative presentation in my 13 declaration, that is true. In the actual 14 damage analysis, I will do more to 15 quantify what -- what the but-for spread 16 is for drugs or for these drug 17 manufacturers during that period of time 18 not subject to the allegations or for 19 drugs and manufacturers during the class 20 period not subject to the allegations and 21 any other studies that are available. 22 Q. And I believe you testified a moment ago</p>

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<p style="text-align: right;">126</p> <p>1 that the ASP that you use in your</p> <p>2 formulaic methodology is an ASP that cuts</p> <p>3 across customer classes?</p> <p>4 A. For the purposes of what I have done here</p> <p>5 in this illustration, it is, yes. It is</p> <p>6 the ASP over all.</p> <p>7 Q. And that is not a proper way to do it, is</p> <p>8 it?</p> <p>9 MR. SOBOL: Objection to the</p> <p>10 form.</p> <p>11 Q. I mean don't you have doubts about</p> <p>12 applying that methodology?</p> <p>13 A. No.</p> <p>14 Q. In other words, what you are saying is if</p> <p>15 a pharmacy is paying \$20 and a hospital is</p> <p>16 paying \$10, then you would calculate an</p> <p>17 ASP of \$15 even though the class members</p> <p>18 are purchasing drugs from pharmacies, not</p> <p>19 hospitals? Is that what you're doing</p> <p>20 here?</p> <p>21 A. Could you repeat the question?</p> <p>22 (The pending question was then</p>	<p style="text-align: right;">128</p> <p>1 leads to a different reimbursement rate.</p> <p>2 And that is what they paid out.</p> <p>3 Q. By the way, in your analysis, would the</p> <p>4 but-for ASP be the same as the actual ASP?</p> <p>5 A. I don't mention a but-for ASP. I am</p> <p>6 saying there is an ASP, and it is what it</p> <p>7 is, and it reflects what the transaction</p> <p>8 reflects. In the real world, there were</p> <p>9 discounts. There were all of these</p> <p>10 financial considerations offered which</p> <p>11 lowered the acquisition cost to</p> <p>12 distributors, to PBMs, to providers, and</p> <p>13 so they receive that in the real world,</p> <p>14 and I am assuming they are going to</p> <p>15 receive it in the but-for world.</p> <p>16 In the but-for world, however,</p> <p>17 they are going to reimburse at a lower</p> <p>18 rate, because the AWP will not be -- it</p> <p>19 will be -- it will conform with the</p> <p>20 expectations of what -- of the</p> <p>21 relationships between AWP and ASP.</p> <p>22 Q. You are saying that the ASP will be the</p>
<p style="text-align: right;">127</p> <p>1 read.)</p> <p>2 A. Well, you are conflating -- there is a lot</p> <p>3 of stuff you are conflating there. I mean</p> <p>4 the -- the class members purchase drugs</p> <p>5 from hospitals and from pharmacies, but</p> <p>6 the -- the purchases from hospitals are</p> <p>7 subject to a per -- a capitation. So that</p> <p>8 they are not subject to AWP.</p> <p>9 There are the -- you know,</p> <p>10 obviously there is going to be some --</p> <p>11 some class members that purchased -- and</p> <p>12 when I look at the actual data of what</p> <p>13 they purchased for that, that is going to</p> <p>14 be available from the manufacturer's data,</p> <p>15 what the ASPs are to the classes of trade.</p> <p>16 I am merely looking at --</p> <p>17 whatever that is, I am looking at the</p> <p>18 other blade of the scissors. I am looking</p> <p>19 at how much more they paid than they</p> <p>20 should have paid, and what the -- and that</p> <p>21 is based on AWP and the but-for AWP, the</p> <p>22 difference between the two, and how that</p>	<p style="text-align: right;">129</p> <p>1 same in the actual and the but-for worlds,</p> <p>2 aren't you?</p> <p>3 A. For purposes of what I have done here, I</p> <p>4 have taken that to be the case.</p> <p>5 Q. Okay. And is that your opinion?</p> <p>6 A. The --</p> <p>7 Q. I mean are you saying that you are going</p> <p>8 to change your methodology down the road?</p> <p>9 A. I am saying that the -- there were -- the</p> <p>10 allegations state two things: that AWP is</p> <p>11 inflated; and ASP was lowered through all</p> <p>12 of these financial considerations.</p> <p>13 And what I am going to look at</p> <p>14 is given what they paid in those financial</p> <p>15 considerations and how it was lowered,</p> <p>16 what should the AWP have been had this</p> <p>17 scheme not been in place.</p> <p>18 Q. But your opinion is that the ASP will stay</p> <p>19 the same?</p> <p>20 A. That's right.</p> <p>21 Q. Okay. And indeed, you express that</p> <p>22 opinion on page 1 of Exhibit F to your</p>

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<p style="text-align: right;">130</p> <p>1 declaration, don't you?</p> <p>2 (Pause.)</p> <p>3 (The witness viewing Exhibit</p> <p>4 No. 002.)</p> <p>5 Q. Is that correct?</p> <p>6 A. Well, for explication of what -- how the</p> <p>7 method will work, I am essentially saying,</p> <p>8 look, there were expectations that had</p> <p>9 been created from the '60s through the</p> <p>10 '80s of a relationship of the benchmark</p> <p>11 price to ASP. Now we get into the '90s,</p> <p>12 and there is an alleged inflation of AWP</p> <p>13 relative to the ASP that was actually</p> <p>14 actual transaction price.</p> <p>15 So I am saying, look, what would</p> <p>16 the AWP -- what should the AWP have been</p> <p>17 absent this scheme given that these are</p> <p>18 the -- the ASPs were the actual</p> <p>19 transaction prices. So I am taking what</p> <p>20 the ASPs were in the real world to be</p> <p>21 those in the but-for world, and I'm coming</p> <p>22 up with what the but-for AWP should have</p>	<p style="text-align: right;">132</p> <p>1 (Mr. Cavanaugh entering the</p> <p>2 deposition room.)</p> <p>3 A. AWP is the benchmark from whence all</p> <p>4 prices flow. Certainly that's the</p> <p>5 definition of the class, and it is the</p> <p>6 basis for negotiating all of the prices.</p> <p>7 Now the ASP is as it is, and I'm</p> <p>8 assuming it stays as it is, and I am</p> <p>9 saying that absent the scheme, the wedge</p> <p>10 or the spread between AWP and ASP would</p> <p>11 have been -- would have been different.</p> <p>12 Q. But --</p> <p>13 A. And I am calculating what that AWP is, and</p> <p>14 that AWP is going to -- that's the same</p> <p>15 for all purchasers. What differs when I</p> <p>16 get into the claims data is whether</p> <p>17 different groups were able to negotiate</p> <p>18 AWP less 50 percent, AWP less 13 percent.</p> <p>19 That is going to be an issue of the quanta</p> <p>20 of injury, and that will differ across,</p> <p>21 once -- once the -- once we get to the</p> <p>22 claims administration phase, I will be</p>
<p style="text-align: right;">131</p> <p>1 been and then the but-for reimbursement.</p> <p>2 MR. SOBOL: I am sorry. On --</p> <p>3 Q. If the ASPs --</p> <p>4 MR. SOBOL: Can I ask a</p> <p>5 question? On Exhibit F, what portion of</p> <p>6 the first page are we talking about where</p> <p>7 the --</p> <p>8 MR. EDWARDS: Do you see where</p> <p>9 it says, "The model"?</p> <p>10 MR. SOBOL: Yes.</p> <p>11 MR. EDWARDS: First page. It</p> <p>12 says, "ASP is given from invoice data and</p> <p>13 will be the same in actual and but-for</p> <p>14 worlds."</p> <p>15 MR. SOBOL: Okay. Thank you.</p> <p>16 BY MR. EDWARDS:</p> <p>17 Q. And if ASP is going to remain the same in</p> <p>18 the actual and the but-for worlds,</p> <p>19 wouldn't it follow from that that all you</p> <p>20 are doing is simply predicting a</p> <p>21 redistribution of prices among customer</p> <p>22 classes?</p>	<p style="text-align: right;">133</p> <p>1 able to look at claims and see what they</p> <p>2 have been, what they were paying, given</p> <p>3 what the actual ASP, the transaction</p> <p>4 price, was.</p> <p>5 Q. Was --</p> <p>6 A. And those impacts will be different for</p> <p>7 different groups, depending on what they</p> <p>8 have negotiated.</p> <p>9 Q. What you are saying is that at the end of</p> <p>10 the day the average sales price, though,</p> <p>11 is going to be the same?</p> <p>12 A. I'm saying that whatever discounts,</p> <p>13 whatever these manufacturers felt was in</p> <p>14 their profit-maximizing or volume-</p> <p>15 maximizing interests to sell the product</p> <p>16 at, the scheme that I have been asked to</p> <p>17 assume existed essentially concealed that</p> <p>18 ASP and the difference between the AWP,</p> <p>19 and absent that scheme, the AWP would be</p> <p>20 lower.</p> <p>21 Q. But I am not --</p> <p>22 A. So the ASP is what it was.</p>

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<p style="text-align: right;">134</p> <p>1 Q. And what I want to do is focus on the 2 ASP -- 3 A. Okay. 4 Q. -- part of the equation. 5 A. Right. 6 Q. And as I understand your testimony, you 7 are saying that at the end of the day, the 8 total dollars being paid or the average 9 dollars being paid for drugs is going to 10 be exactly the same in the but-for and 11 actual worlds? Correct? 12 MR. SOBOL: Objection to the 13 form. 14 A. I am saying that had these manufacturers 15 sold the drugs exactly as they had sold 16 them at the prices that they sold them at, 17 at the ASP reflected as the average across 18 all sales, but they had not engaged in 19 this fraudulent concealment of the spread, 20 that they will get -- they will get what 21 they got anyway, but the third-party 22 payers will -- will have -- the overcharge</p>	<p style="text-align: right;">136</p> <p>1 retail chains. And the companies are 2 going to get what they got before. But 3 the -- the AWP -- the relationship to the 4 AWP, the relationship between the AWP and 5 that much lower ASP will reflect what 6 that relationship should have been absent 7 this scheme of hiding this information 8 from the class members. 9 Q. Well, you said "that much lower ASP." I 10 thought you testified that the ASP is 11 going to be the same? 12 A. Relative -- 13 MR. SOBOL: Objection. 14 Objection to the form. 15 A. Relative to the AWP. 16 Q. So now you are saying that the ASP will be 17 different? 18 A. No. 19 MR. SOBOL: Objection to the 20 form. 21 A. Here you have got -- 22 MR. SOBOL: There is no question</p>
<p style="text-align: right;">135</p> <p>1 that they suffered, the impact and the 2 injury from their overcharge will be 3 accounted for. 4 Q. Well, for the ASP to stay the same, it 5 must be the case then that in your but-for 6 world some people would pay more and some 7 people would pay less? 8 MR. SOBOL: Objection to the 9 form. 10 A. Well, I -- I have just -- I have just said 11 that that is -- whatever they were paid -- 12 what the -- whatever discounts and 13 whatever -- whatever blandishments were 14 offered to these various people and 15 whatever they paid, they paid, and that is 16 reflected in their ASP and the average 17 ASP. 18 And those were paid, don't 19 forget, in many cases not to the 20 third-party -- not to the class members. 21 They were paid to the doctors. They were 22 paid to the PBMs. They were paid to the</p>	<p style="text-align: right;">137</p> <p>1 before you. 2 Q. Let's take a look at Dr. Schondelmeyer's 3 declaration. 4 MR. EDWARDS: We will mark this 5 as Exhibit 5. It is a declaration of 6 Stephen Schondelmeyer. By the way, is he 7 a doctor? I have been calling him doctor. 8 Everybody is a doctor. 9 MR. SOBOL: I have been calling 10 him doctor. 11 MR. EDWARDS: This is a room of 12 doctors. 13 THE WITNESS: Really? 14 MR. EDWARDS: We are juris 15 doctors. People don't consider our 16 degrees to be as worthy as yours. 17 THE WITNESS: I do. I do. 18 MR. EDWARDS: It is dated 19 September 2, 2004. 20 (Declaration of Stephen W. 21 Schondelmeyer in Support of 22 Plaintiffs' Motion for Class</p>

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36 (Pages 138 to 141)

<p style="text-align: right;">138</p> <p>1 Certification marked</p> <p>2 Exhibit Hartman 005 for</p> <p>3 identification.)</p> <p>4 THE WITNESS: Can I give my</p> <p>5 Lupron stuff back, or should I hold on to</p> <p>6 it?</p> <p>7 MR. EDWARDS: Sure. We may give</p> <p>8 it back to you later today.</p> <p>9 (Handing Exhibit No.004 to</p> <p>10 Mr. Edwards.)</p> <p>11 BY MR. EDWARDS:</p> <p>12 Q. So take a look at paragraph 88 of the</p> <p>13 Schondelmeyer declaration.</p> <p>14 (Witness complying.)</p> <p>15 Q. Do you have that in front of you?</p> <p>16 A. Yes.</p> <p>17 Q. He says in the second to the last sentence</p> <p>18 on page 36, quote, "Because class of trade</p> <p>19 differentials exist and are outside of the</p> <p>20 control of the purchaser, an accurate</p> <p>21 approach to estimating actual acquisition</p> <p>22 costs must take into account the class of</p>	<p style="text-align: right;">140</p> <p>1 you agree with that?</p> <p>2 A. I am trying to understand it.</p> <p>3 Q. I will ask the question a different way.</p> <p>4 MR. SOBOL: You are withdrawing</p> <p>5 the question?</p> <p>6 Q. Do you have any basis to disagree with</p> <p>7 that?</p> <p>8 MR. SOBOL: That was helpful.</p> <p>9 THE WITNESS: Yes. That helps.</p> <p>10 (Laughter.)</p> <p>11 A. Well, the -- in order for me to really</p> <p>12 render an informed opinion, I would need</p> <p>13 to read this more closely.</p> <p>14 Let me say the following: that</p> <p>15 my understanding of classes of trade</p> <p>16 correspond to some of the distribution</p> <p>17 channels that he mentions in paragraph 86:</p> <p>18 Chain pharmacies, mass merchandisers,</p> <p>19 pharmacies, food and drug pharmacies,</p> <p>20 independent pharmacies, mail order</p> <p>21 pharmacies, and health plan pharmacies.</p> <p>22 So that is true.</p>
<p style="text-align: right;">139</p> <p>1 trade pricing practices of drug firms."</p> <p>2 Do you agree with that?</p> <p>3 MR. SOBOL: Objection to the</p> <p>4 form.</p> <p>5 A. You know, I am trying to understand -- now</p> <p>6 when he is talking about classes of trade,</p> <p>7 I am understanding him to mean mass</p> <p>8 merchandisers, food stores, retail chains,</p> <p>9 independent pharmacies, hospitals,</p> <p>10 et cetera, et cetera, and not the class</p> <p>11 members. So we're talking about -- I am</p> <p>12 going back to page 35, channels of</p> <p>13 distribution, classes of trade, and he is</p> <p>14 saying that --</p> <p>15 MR. SOBOL: You are mumbling.</p> <p>16 THE WITNESS: I am sorry. Let</p> <p>17 me say nothing.</p> <p>18 (Pause.)</p> <p>19 (The witness viewing Exhibit</p> <p>20 No. 005.)</p> <p>21 BY MR. EDWARDS:</p> <p>22 Q. The question is simple, Dr. Hartman. Do</p>	<p style="text-align: right;">141</p> <p>1 Q. Hospitals?</p> <p>2 A. And hospital pharmacies, and physicians</p> <p>3 and clinics.</p> <p>4 Q. I have got you.</p> <p>5 A. Okay.</p> <p>6 And there are going to be</p> <p>7 differences --</p> <p>8 THE WITNESS: Is there a party</p> <p>9 going on?</p> <p>10 (Pause.)</p> <p>11 A. There are going to be -- the ability of</p> <p>12 these different groups, as I have pointed</p> <p>13 out in my own declaration in terms of who</p> <p>14 is moving market share of which products,</p> <p>15 whether we have got PBMs moving brand name</p> <p>16 drugs, whether we have got retailers or</p> <p>17 mail order pharmacies -- well, I am sorry,</p> <p>18 let me go back.</p> <p>19 Whether we have PBMs moving</p> <p>20 market share for a single-source branded</p> <p>21 pharmaceuticals, whether we have mail</p> <p>22 order staff model HMOs moving multisource</p>

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<p style="text-align: right;">142</p> <p>1 branded products, whether we have</p> <p>2 retailers moving generic drugs, whether we</p> <p>3 have physicians moving injectable drugs,</p> <p>4 physician-administered drugs, wherever</p> <p>5 there are going to be those classes of</p> <p>6 trade that or those groups as I have</p> <p>7 identified them that are the ones that</p> <p>8 need to be incentivized to move market</p> <p>9 share, they will receive more of the price</p> <p>10 offsets than others, which means that</p> <p>11 there will be differentials across those</p> <p>12 groups, and that is accounted for in what</p> <p>13 I'm doing, and I'm assuming they are still</p> <p>14 going to do that.</p> <p>15 Q. Is it your understanding that average</p> <p>16 sales prices for hospitals is lower than</p> <p>17 average sales prices for pharmacies?</p> <p>18 MR. SOBOL: Objection to the</p> <p>19 form.</p> <p>20 A. The -- the acquisition cost to different</p> <p>21 groups, depending on the various types of</p> <p>22 price offsets offered to different groups</p>	<p style="text-align: right;">144</p> <p>1 Q. If you calculated your but-for AWP using</p> <p>2 the pharmacy ASP only as opposed to</p> <p>3 calculating an ASP across all customer</p> <p>4 classes, don't you think it would be the</p> <p>5 case that the spread would be or the</p> <p>6 but-for AWP would be higher --</p> <p>7 MR. SOBOL: Objection.</p> <p>8 Q. -- than it would be using an ASP cutting</p> <p>9 across all customer classes?</p> <p>10 MR. SOBOL: Objection to the</p> <p>11 form. Asked and answered.</p> <p>12 A. The -- one could calculate the but-for</p> <p>13 spread in that fashion or the spread in</p> <p>14 that fashion, but it would be wrong.</p> <p>15 Q. So you disagree with Schondelmeyer that</p> <p>16 you have to distinguish between customer</p> <p>17 classes?</p> <p>18 A. No. I am saying that what he says is</p> <p>19 true, and the -- what he -- the decisions</p> <p>20 made by any given manufacturer to</p> <p>21 incentivize different groups where they</p> <p>22 are going to offer greater financial</p>
<p style="text-align: right;">143</p> <p>1 for different types of drugs -- you have</p> <p>2 just made a very broad statement. I don't</p> <p>3 know if it is true for all drugs. It</p> <p>4 might be true for hospital inpatient types</p> <p>5 of drugs, injectables. It might not be</p> <p>6 true for orals, but that's -- there are</p> <p>7 going to be differences in various amounts</p> <p>8 of price offsets and financial</p> <p>9 considerations offered to those groups</p> <p>10 that are being incentivized to move the</p> <p>11 market share to increase -- to take</p> <p>12 advantage and increase the spread beyond</p> <p>13 what can be reasonably expected.</p> <p>14 Q. You don't recall that claim being made in</p> <p>15 the name brand cases, that hospitals get</p> <p>16 lower prices than pharmacies?</p> <p>17 MR. SOBOL: Objection to the</p> <p>18 form.</p> <p>19 A. I am sure that hospitals get lower prices</p> <p>20 than pharmacies on some drugs. Whether it</p> <p>21 is true for all drugs, I would need to</p> <p>22 look at the data.</p>	<p style="text-align: right;">145</p> <p>1 considerations to one versus another is</p> <p>2 summarized overall in the average sales</p> <p>3 price for all units sold.</p> <p>4 Now that average will be an</p> <p>5 average of some ASPs that are higher and</p> <p>6 some that are lower. That is not -- that</p> <p>7 is not relevant.</p> <p>8 The point is we know what it</p> <p>9 was. It was sold for what it was sold</p> <p>10 for. It reflected what the discounts and</p> <p>11 the profit-maximizing or volume-maximizing</p> <p>12 strategic objectives of these companies.</p> <p>13 Q. Well --</p> <p>14 A. The point is once that was done, and you</p> <p>15 add up these differentials that</p> <p>16 Schondelmeyer rightly says are there, you</p> <p>17 have an average sale price that summarizes</p> <p>18 all of those strategies across the</p> <p>19 different classes of trade, and that is</p> <p>20 what the spread -- the fraudulent</p> <p>21 concealment is the relationship of an</p> <p>22 average transactions price to a single</p>



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<p style="text-align: right;">146</p> <p>1 AWP.</p> <p>2 Q. Well --</p> <p>3 A. You don't have multiple AWP's, a hospital</p> <p>4 AWP, and a retailer AWP.</p> <p>5 Q. But if Mr. Schondelmeyer --</p> <p>6 Dr. Schondelmeyer is saying you shouldn't</p> <p>7 add them up, you shouldn't combine them,</p> <p>8 are you saying he is wrong?</p> <p>9 MR. SOBOL: Objection to the</p> <p>10 form.</p> <p>11 A. I don't -- I didn't see where he said you</p> <p>12 shouldn't add them up, and I don't -- he</p> <p>13 is -- I don't see a model that he is</p> <p>14 developing. To come up -- for me to draw</p> <p>15 a conclusion and for -- to respond to a</p> <p>16 question like that, I'm going to read his</p> <p>17 thing fully, and I'm --</p> <p>18 Q. Well, let's take a look at his paper,</p> <p>19 which you said you had read and you relied</p> <p>20 on in your report.</p> <p>21 MR. EDWARDS: We will mark it as</p> <p>22 Exhibit 6. It is a document entitled</p>	<p style="text-align: right;">148</p> <p>1 MR. LYNCH: Off the record.</p> <p>2 (Discussion off the record.)</p> <p>3 THE WITNESS: Are we off the</p> <p>4 record?</p> <p>5 MR. SOBOL: No.</p> <p>6 Q. All set?</p> <p>7 A. Close.</p> <p>8 (Further pause.)</p> <p>9 (The witness continuing to view</p> <p>10 Exhibit No. 006.)</p> <p>11 A. Okay. It looks to be the report upon</p> <p>12 which I relied.</p> <p>13 Q. And if you look at the second paragraph of</p> <p>14 the introduction, the third sentence, it</p> <p>15 says, "After review and evaluation of the</p> <p>16 options, the authors recommend that actual</p> <p>17 acquisition costs be estimated by using</p> <p>18 manufacturer supplied data on average</p> <p>19 selling prices by class of trade."</p> <p>20 Do you agree with that?</p> <p>21 A. And this is -- this is for Medicare</p> <p>22 Part B, I take it, is what they're making</p>
<p style="text-align: right;">147</p> <p>1 Medicaid and Medicare Drug Pricing:</p> <p>2 Strategy to Determine Market Prices, Final</p> <p>3 Report, June 21, 2004, and it looks like</p> <p>4 it has a logo of Abt Associates on it.</p> <p>5 (Medicaid and Medicare Drug</p> <p>6 Pricing: Strategy to Determine</p> <p>7 Market Prices, Final Report</p> <p>8 marked Exhibit Hartman 006</p> <p>9 for identification.)</p> <p>10 THE WITNESS: Should I hang on</p> <p>11 to this or should I --</p> <p>12 MR. EDWARDS: It is up to you.</p> <p>13 (Handing Exhibit No. 005 to</p> <p>14 Mr. Edwards.)</p> <p>15 (Pause.)</p> <p>16 (The witness viewing Exhibit</p> <p>17 No. 006.)</p> <p>18 BY MR. EDWARDS:</p> <p>19 Q. Can you identify this document?</p> <p>20</p> <p>21 A. I am in the process of doing so.</p> <p>22 (Further pause.)</p>	<p style="text-align: right;">149</p> <p>1 this recommendation for?</p> <p>2 Q. Well, it says Medicaid and Medicare</p> <p>3 Part B, I believe.</p> <p>4 A. I would have -- I would have to know more</p> <p>5 about what he is trying to do and more</p> <p>6 about the full set of recommendations he</p> <p>7 seems to be making before I would agree</p> <p>8 with that.</p> <p>9 Q. So you can't embrace that sentence on its</p> <p>10 face?</p> <p>11 A. No.</p> <p>12 Q. Okay. Take a look at page 20.</p> <p>13 (Witness complying.)</p> <p>14 Q. The last paragraph on the page is headed</p> <p>15 Estimated Separately by Class of Trade,</p> <p>16 and he says there, quote, "Because actual</p> <p>17 acquisition costs vary by class of trade,</p> <p>18 the estimation methodology must take into</p> <p>19 account these differentials in order to</p> <p>20 generate drug product payments that are</p> <p>21 both accurate and reflect generally and</p> <p>22 widely available prices."</p>

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<p style="text-align: right;">150</p> <p>1 Do you agree with that?</p> <p>2 A. Well, I agree that under my reading of the</p> <p>3 Medicare statutes that they were designed</p> <p>4 to -- for the third-party payers to</p> <p>5 reimburse at the estimated acquisition</p> <p>6 cost, which --</p> <p>7 Q. I am just asking you whether you agree</p> <p>8 with it.</p> <p>9 A. Well, I'm -- I'm prefacing my remarks.</p> <p>10 Q. You can't answer my question yes, I do;</p> <p>11 no, I don't; I agree with some of it, not</p> <p>12 all of it; some answer that we can</p> <p>13 understand?</p> <p>14 A. Oh, you can understand all of my answers.</p> <p>15 It's --</p> <p>16 Q. Do you agree with it?</p> <p>17 MR. SOBOL: What is the "it"?</p> <p>18 MR. EDWARDS: That sentence that</p> <p>19 I just read into the record.</p> <p>20 MR. SOBOL: Apart from the rest</p> <p>21 of the document, or just that sentence,</p> <p>22 you know, in isolation?</p>	<p style="text-align: right;">152</p> <p>1 as requiring that differentiation. So</p> <p>2 there are proposals here and options about</p> <p>3 the direction that he wants to go that</p> <p>4 does not reflect in my mind what -- the</p> <p>5 way the industry has worked over the last</p> <p>6 20 years, and it is not a way that informs</p> <p>7 the but-for understanding of relationships</p> <p>8 between AWP and some measure of average</p> <p>9 transaction prices. This -- this is some</p> <p>10 way of doing it, but it is -- it is</p> <p>11 essentially running independent to, I</p> <p>12 find, what I have done.</p> <p>13 Q. Well, if you were required to calculate</p> <p>14 your but-for AWPs on the basis of ASPs on</p> <p>15 a class of trade/class of trade basis,</p> <p>16 would that have an impact on your opinion?</p> <p>17 A. So what you are saying is that you want me</p> <p>18 to assume a hypothetical world, not in</p> <p>19 evidence, and that doesn't exist, and it</p> <p>20 is not the way the world has worked over</p> <p>21 the last 40 years, but in a world where</p> <p>22 there are differential AWPs by class of</p>
<p style="text-align: right;">151</p> <p>1 MR. EDWARDS: Well, we could</p> <p>2 spend a lot of time, but I think it is</p> <p>3 pretty clear that Schondelmeyer thinks if</p> <p>4 you are going to come up with a --</p> <p>5 MR. SOBOL: A new system?</p> <p>6 MR. EDWARDS: -- a new system</p> <p>7 based on ASP pricing --</p> <p>8 MR. SOBOL: All right.</p> <p>9 MR. EDWARDS: -- you have got to</p> <p>10 distinguish between classes of trade.</p> <p>11 MR. SOBOL: On a new system</p> <p>12 going forward? This isn't a damage model.</p> <p>13 MR. EDWARDS: But for a new</p> <p>14 system.</p> <p>15 A. I'm not sure what he is proposing here and</p> <p>16 in what context. There are clearly a set</p> <p>17 of prices, an average set of prices, at</p> <p>18 which drugs are available from the</p> <p>19 manufacturer that is represented by the</p> <p>20 average for the manufacturer, and this --</p> <p>21 he has an opinion to differentiate that</p> <p>22 further. Medicare Part B I have not seen</p>	<p style="text-align: right;">153</p> <p>1 trade? You want me to consider that</p> <p>2 world?</p> <p>3 Q. What I want -- one of the classes that you</p> <p>4 are opining on is a class of third-party</p> <p>5 payers who purchased drugs through PBMs.</p> <p>6 Correct?</p> <p>7 A. I wouldn't call them a class of trade. I</p> <p>8 would call them -- they are a payer.</p> <p>9 Class of trade is --</p> <p>10 Q. I wasn't calling them a class of trade. I</p> <p>11 was talking about the classes in this</p> <p>12 case.</p> <p>13 A. I am sorry. I thought I heard class of</p> <p>14 trade.</p> <p>15 Q. One of the classes in this case being</p> <p>16 alleged --</p> <p>17 A. Right.</p> <p>18 Q. -- proffered by plaintiffs in this case is</p> <p>19 a class of third-party payers who</p> <p>20 purchased drugs through PBMs. Is that</p> <p>21 right?</p> <p>22 A. That is right.</p>



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<p style="text-align: right;">154</p> <p>1 Q. Now if you were required in your analysis 2 to base your calculation of the but-for 3 AWP's for that class on the ASP's of 4 pharmacies, would that have an impact on 5 your opinion? 6 A. Well, it would -- to -- to develop a model 7 or to develop a methodology or to develop 8 an approach to evaluate the extent of 9 injury and damages using the hypothetical 10 you proposed is totally orthogonal to the 11 world as it existed. So if you want -- it 12 is not the way -- my assumption of the 13 but-for world is the world as it existed 14 absent the fraudulent activities, and that 15 consists of a world with a single AWP by 16 an NDC, and it doesn't get at this, and 17 there are -- you know, there are a variety 18 of ways of proposing options for changing 19 the world, but I'm not -- I'm not looking 20 at that. I am looking at how the world 21 existed, and how the alleged activities 22 within the -- everything else being the</p>	<p style="text-align: right;">156</p> <p>1 A. The -- let's -- let's think of an example. 2 Let's think about Hatch-Waxman situations 3 these days when drugs go generic. 4 Q. You can't answer that question yes or no? 5 A. Read it back again, if you would, please. 6 (Prior record read.) 7 A. This is -- we are back -- this is an asked 8 and answered dance that we have done 9 earlier. 10 The fact that a third-party 11 payer has an idea that ASP diverges 12 significantly from the AWP which is the 13 basis for its reimbursement rates -- I was 14 going to give you an example, but we won't 15 go to an example -- and they have 16 knowledge of that, they are impacted by 17 the fraudulent activities, because they 18 have to do something about it. There is 19 an impact for them. They have to respond. 20 The world is different. And to the extent 21 that they know fully what -- what that 22 deviation is, they can negotiate more</p>
<p style="text-align: right;">155</p> <p>1 same but for this AWP scheme, what -- what 2 would the AWP's have looked like, and it 3 wouldn't -- they wouldn't have looked like 4 a world where there were different AWP's 5 for different -- for things sold through 6 different classes of trade. That is not 7 the world we live in. 8 Q. All right. Well, the way we got into this 9 subject is I think I had asked you if you 10 would agree that if a class member knew 11 what the ASP was for a particular drug 12 would there be any causation, and I don't 13 recall what your answer was to that. Do 14 you recall? 15 MR. SOBOL: Objection to form. 16 A. Why don't you propose -- say that again? 17 Have it read back? 18 Q. If a class member knows what the ASP is 19 for a particular drug, would there be 20 causation? 21 MR. SOBOL: Objection to the 22 form.</p>	<p style="text-align: right;">157</p> <p>1 aggressively. To the extent they don't 2 know it, they can't negotiate. So that 3 will affect the -- at the end of the day, 4 that is going to affect the quanta at the 5 claims administration phase. 6 Q. And you have to understand the extent to 7 which they had that sort of knowledge in 8 order to determine whether there was any 9 impact at all? 10 MR. SOBOL: Objection to the 11 form. 12 Q. Isn't that correct? 13 MR. SOBOL: Objection to the 14 form. Asked and answered. 15 A. Again, how many times -- 16 Q. Well, let's take a look at -- 17 MR. SOBOL: May I make a 18 suggestion? 19 Q. Let's take a look at -- 20 MR. SOBOL: It is 1:06 right 21 now. 22 MR. EDWARDS: Can I just ask a</p>